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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MISSOURI COALITION FOR THE ENVIRONMENT, *et al.*,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal agency that declines to prepare an environmental impact statement, on the basis of a determination that its action will result in no significant environmental impact, must articulate a "reasoned evaluation" of the factors relevant to that determination.

2. Whether the court may refuse to review that determination of no significant environmental impact on the ground that the plaintiff is unable to "demonstrate that there were facts omitted from the administrative record which, if true, would show that the permitted project could have a substantial impact on the environment."

PARTIES TO THE PROCEEDING

The petitioners are Missouri Coalition for the Environment, a corporation; League of Women Voters of St. Louis County, a corporation; League of Women Voters of St. Louis, a corporation; The Open Space Council for the St. Louis Region, a corporation;[1] Lee Streett; Martin E. Gardner, Jr.; Cornelius Alwood; Donald F. Weiler; Stanley J. Adams; and Beverly Toner.

The respondents are the Corps of Engineers of the United States Army; John O. Marsh, Jr., Secretary of the Army; Robert K. Dawson, Assistant Secretary of the Army for Civil Works; Lt. Gen. E. R. Heiberg, III, Chief of Engineers; Col. Robert M. Amrine, former District Engineer of the Kansas City District, Corps of Engineers; Col. John H. Atkinson, III, District Engineer of the Kansas City District, Corps of Engineers, all in their official capacities; and Sverdrup Corporation, a corporation;[2] Riverport, Inc., a corporation; and Riverport Associates, a limited partnership.

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[1] None of these corporations has any parent or subsidiary corporation. The Missouri Coalition for the Environment is affiliated with the Missouri Coalition for the Environment Foundation, a not-for-profit corporation. The Open Space Council for the St. Louis Region is affiliated with the St. Louis Regional Open Space Foundation, a not-for-profit corporation. The two Leagues of Women Voters are affiliated with the national League of Women Voters, and other local Leagues.

[2] Petitioners believe that Sverdrup Corporation has a number of subsidiary or affiliate corporations, but petitioners are unable to identify them.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Missouri Coalition for the Environment and associated petitioners petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (*infra*, 1a-17a) is reported at 866 F.2d 1025. The opinion of the district court (*infra*, 18a-45a) is reported at 678 F.Supp. 790.

JURISDICTION

The judgment of the court of appeals (*infra*, 80a) was entered on March 24, 1989. The court of appeals denied the petition for

rehearing or rehearing en banc on March 17, 1989 (*infra*, 82a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 102 of the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. 4332, provides, in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall —
>
> . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> . . .
>
> (E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

STATEMENT

Petitioners seek review of a divided court of appeals decision affirming a district court's determination that the Army Corps of Engineers had fully complied with NEPA when the Corps' District Engineer decided that no environmental impact statement was required in association with his final determination re-evaluating a revised project.

In 1983 the non-governmental defendants proposed to construct an industrial park to be known as "Riverport," in the floodplain of the Missouri River, on the western border of St. Louis County, Missouri, thirty miles upstream from the junction of that river with the Mississippi River (*infra,* 2a, 56a). This site is located within some 22,000 acres of floodplains and wetlands on the St. Louis County side of the Missouri River, commonly known as the Missouri Bottoms (*infra,* 2a). Because the proposed development included construction of a 4100-foot levee, 800 feet of which would be built in wetlands, Riverport Associates applied to the District Engineer for a permit to discharge fill in wetlands pursuant to § 404 of the Clean Water Act of 1977, 33 U.S.C. § 1344 (*infra,* 3a).

While the District Engineer was reviewing the permit-application, the United States Fish and Wildlife Service (FWS) submitted to the District Engineer copies of press reports of plans of St. Louis County, Missouri, to build a 70,000-seat domed stadium in Riverport, leading the Corps to inquire of the developer about plans for the stadium (IX AR 4906; X AR 5149-51). On March 29, 1985, the developer responded that "we have no plans to develop a stadium in the Riverport project" (Jt. Ex. 205).

On April 29, 1985, the District Engineer issued his Environmental Assessment (EA) and his Finding of No Significant Impact (FONSI) (*infra,* 56a, 79a). On May 16, 1985, the District Engineer issued a permit to discharge fill in wetlands in association with the construction of an "industrial park" (*infra,* 3a).

Within fifteen days after the permit was issued, St. Louis County officials met with executives of the developer to revive the proposal for the stadium in Riverport (Jt. Exs. 157, 151, 152, 159). In December, 1985, the St. Louis County Council approved a contract to acquire 100 acres of land in Riverport, in order to build the 70,000-seat domed stadium there (VIII AR 4155-57). Additional acreage in the floodplains and wetlands would be acquired for construction of parking lots for 9900 vehicles outside the area protected by the levee (*infra*, 48a). On December 16, 1985, the District Engineer met with officials of the developer and St. Louis County, and announced that he was re-evaluating the permit in light of changed circumstances (*infra*, 26a).

On June 25, 1986, some of the plaintiffs in this case filed suit in the federal court (*Riverport I*), challenging the procedure followed in granting the § 404 permit and challenging the proposed inclusion of the stadium in the project (*infra*, 10a, 27a). After the district court dismissed claims relating to the stadium on the ground that they were not ripe for review, that suit was settled with a consent decree by which the plaintiffs reserved their rights to assert all claims and allegations concerning the stadium and related parking lots outside the levee (*infra*, 10a). The consent decree further provided that the District Engineer would complete his re-evaluation of the revised project, and "as a result of that re-evaluation, the Corps will make a final determination on the matter" (I AR 93).

The District Engineer resumed his re-evaluation of the revised project, which had been suspended pending the litigation. He issued an order prohibiting construction of the stadium (I AR 204, 207) until his re-evaluation was concluded. On June 22, 1987, the District Engineer issued his "Memorandum for Record" (MFR) to record the results of his re-evaluation (*infra*, 4a, 48a). In support of his determination not to suspend, revoke or modify the permit, he "concluded that the change of environmental impacts due to the revised project" did not war-

rant any further action (*infra,* 51a). Comparing the impacts of the revised project with those of the original proposed industrial park, he concluded that the revised project would result in potentially significant changes in only two of twenty-eight environmental impacts addressed in the EA, namely, economic and recreational impacts, and concluded that those two changes warranted no further action (*infra,* 51a). He commented on four other environmental concerns: alternative sites, highway access, air quality, and cumulative impacts (*infra,* 51a-55a).

On July 30, 1987, this suit was filed, claiming that the re-evaluation violated various statutes, including NEPA (*infra,* 5a). The complaint alleged, inter alia, that the District Engineer had failed to articulate a reasoned explanation of his determination that the revised project would result in no significant impact, that certain significant impacts would result, that the District Engineer's finding of no practicable alternative was not supported by the evidence, and that the ultimate determination was arbitrary and capricious. After trial, the court ruled that since the Corps had "considered" the various claims of environmental impacts (*infra,* 29a-41a), the Corps had fulfilled its obligations under NEPA. Accordingly, the district court dismissed the complaint.

The court of appeals affirmed, one judge dissenting. The court agreed that the Corps was required to comply with NEPA in conducting its re-evaluation. Without deciding whether the District Engineer had provided an adequately reasoned explanation why environmental impacts would not be significant, or whether he had set forth adequate findings to justify his conclusion, or whether any findings were supported by the evidence, the court held that the Corps staff had fulfilled the statutory obligations by "considering" various alleged impacts (*infra,* 9a, 13a-14a). The court held:

> The question before us is not, as the Coalition urges, whether the MFR contains the requisite convincing reasons

> to stand on its own, but whether, under the appropriate standard of review, the determinative finding in the MFR is sustainable on the administrative record made.

Infra, 9a. That "determinative finding" of no significant impact is to be sustained, notwithstanding the absence of any reasoned evaluation of the relevant factors, the court ruled, if the administrative record indicates that "the agency has considerd the environmental consequences before taking action" (*infra*, 13a). The court further held that it would not "reach the question of whether the agency's decision not to prepare an EIS was reasonable" because, in its view, petitioners had failed "to demonstrate that there were facts omitted from the administrative record which, if true, would show that the permitted project could have a substantial impact on the environment" (*infra*, 13a, 12a).

Judge Fagg dissented on the ground that the proposal to build a domed stadium in Riverport is moot (*infra*, 15a-17a).[3]

A petition for rehearing or rehearing en banc was denied (*infra*, 82a).

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[3] Mootness is not one of the questions presented in this petition, because the question of mootness is factbound and less significant than the questions presented here. Mootness of the proposal to build a stadium in Riverport would not moot the questions presented in this petition. If Judge Fagg is correct, the case should be remanded to the district court with directions to vacate the District Engineer's decision (*infra*, 17a). *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329, 331 (1961). In that event, petitioners, pursuant to the prayer of their complaint, would be entitled to recover their costs, fees and expenses pursuant to 28 U.S.C. § 2412(d)(1)(A) (Equal Access to Justice Act), "unless the court finds that the position of the United States was substantially justified." The court of appeals has already ruled (erroneously) that the position of the United States not only was substantially justified but was indeed correct. That ruling would preclude recovery unless it is reversed. Accordingly, a ruling which simply vacates the Corps' decision as moot would not moot the questions presented in this petition.

REASONS FOR GRANTING THE PETITION

The court of appeals has departed from the teaching of *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n.21 (1976) (hereinafter "*Kleppe*") and *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.,* 462 U.S. 87, 97-98, 105 (1983) (hereinafter "*Baltimore Gas*"). The January, 1989, decision of the court of appeals also conflicts directly with this Court's May 1, 1989, decision in *Marsh v. Oregon Natural Resources Council,* 57 U.S.L.W. 4504, 4509-11 (hereinafter "*ONRC*"), illustrating the fundamental procedure of judicial review of agency action under NEPA, a procedure followed by all other circuits. The decision of the court of appeals permits an agency in the Eighth Circuit to evade NEPA. The decision insulates from effective judicial review the agency determination that no EIS is required by NEPA, on the basis of two holdings. First, the court of appeals incorrectly held that an agency determination not to prepare an EIS need not be supported by a statement of reasons why potential environmental effects are insignificant (*infra,* 9a). Second, in a corollary holding, the court of appeals incorrectly held that, before a plaintiff may obtain judicial review of an agency determination not to prepare an EIS, the plaintiff must "demonstrate that there were facts omitted from the administrative record which, if true, would show that the permitted project could have a substantial impact on the environment" (*infra,* 12a).

This clear deviation by the court of appeals from, and its explicit rejection of, established precedent has immense practical significance. Most agency compliance with NEPA consists of the "threshold determination" whether or not to prepare an

EIS, rather than the preparation of EIS's.[4] Effective judicial review of this threshold decision is essential to preserve NEPA's "sweeping commitment to 'prevent or eliminate damage to the environment and biosphere' by focusing government and public attention on the environmental effects of proposed agency action" (*ONRC*, 57 U.S.L.W. at 4507).

1. Section 102(2)(C) of NEPA directs that a federal agency proposing an action that may significantly affect the quality of the human environment must prepare a detailed statement on "the environmental impact of the proposed action." 42 U.S.C. 4332(2)(C). This requirement serves two purposes: first, it obligates the agency to consider the environmental consequences of the proposed action; and second, it "inform[s] the public that [the agency] has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas*, 462 U.S. at 97.

This Court has established the standard of review of an agency determination not to prepare an EIS:

> The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 838 (1972).

Kleppe, 427 U.S. at 410 n.21. Through the reference to *NRDC*

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[4] EPA's Office of Federal Activities estimates that EA's (determining not to prepare an EIS) outnumber EIS's by a ratio ranging from 20:1 to 40:1. Even lawsuits complaining of a refusal to prepare an EIS outnumbered lawsuits complaining of the sufficiency of an EIS by 3 to 1 in 1985, and substantial margins generally. See 17th Annual Report of Council on Environmental Quality 240-42. According to a telephone conversation with a Policy Advisor of the Corps of Engineers, in fiscal year 1985 the Corps of Engineers acted on 11,582 permit applications, but prepared only 15 EIS's relating to those applications.

v. Morton, this Court incorporated the District of Columbia Circuit's explication of the term "hard look" in *Greater Boston Television Corp. v. FCC,* 444 F.2d 841 (D.C. Cir. 1970), cert. den., 403 U.S. 923:

> The function of the court is to assure that the agency has given *reasoned* consideration to all the material facts and issues . . . This calls for insistence that the agency *articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts* . . . [T]he *findings* must cover all the substantial differences between the [parties] . . . [T]he court's rigorous insistence on the need for conjunction of *articulated standards and reflective findings* . . .

444 F.2d at 851-52 (emphasis added). These points were reemphasized, with specific reference to NEPA litigation, by this Court in *Baltimore Gas,* 462 U.S. at 97-98, 105 (1983):

> NEPA has twin aims. First, it "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action." . . . Second, it ensures that the agency will *inform the public* that it has indeed considered environmental concerns in its decisionmaking process . . . Congress . . . required only that the agency take a "hard look" at the environmental consequences before taking a major action. See *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n.21 (1976). The role of the courts is simply to ensure that the agency has *adequately* considered *and disclosed* the environmental impact of its actions and that its decision is not arbitrary or capricious . . . Our only task is to determine whether the commission has considered the relevant factors and *articulated a rational connection* between the facts found and the choice made.

(Emphasis added.) Thus this Court has emphatically specified the minimum requirements of articulated findings and reasons.

After the decision of the court of appeals, this Court illustrated step by step the procedure to be followed on judicial review of a determination not to prepare an EIS. In *Marsh v. Oregon Natural Resources Council,*[5] 57 U.S.L.W. 4504 (May 1, 1989) this Court:

a. Insisted that

> . . . courts [must] carefully review . . . the record and satisfy . . . themselves that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information. A contrary approach would not simply render judicial review generally meaningless, but would be contrary to the demand that courts ensure that agency decisions are founded on a reasoned evaluation "of the relevant factors."

57 U.S.L.W. at 4509;[6]

b. Identified a Corps document responding to public demands for an EIS (a "Supplemental Information Report," or "SIR") as the document to examine to search for that reasoned evaluation (id. at 4509);

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[5] In *ONRC* this Court reviewed an agency decision not to prepare a supplemental EIS, a determination which is, for purposes of judicial review, "similar to the decision whether to prepare an EIS in the first instance." 57 U.S.L.W. at 4508.

[6] The requirement that such a document be made available is spelled out in the regulations of the Council on Environmental Quality that a finding of no significant impact be set forth in "a document . . . briefly presenting the reasons why an action . . . will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared." 40 C.F.R. § 1508.13. See also Corps regulations in effect in June, 1987, 33 C.F.R. § 230.10 (1987) and revised regulations adopted February 3, 1988, 33 C.F.R. § 230.11 (1988).

c. Identified the Corps' explanations in that SIR responding to the plaintiffs' concerns (id. at 4509-10); and

d. Determined that responses were rational, and supported by evidence (id. at 4509-11).

If this guide had been available, the court of appeals might have followed this procedure, and reached a different result.

Further, the decision below conflicts with the decisions of every other circuit which has addressed the procedure of judicial review of an agency determination not to prepare an EIS. A sampling of cases from other circuits is set forth in the footnote,[7] all holding that the agency must furnish a convincing

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[7] Decisions of other circuits reviewing agency determination that no EIS is required:

District of Columbia Circuit

Arizona Public Service Co. v. FPC, 483 F.2d 1275, 1282 (D.C. Cir. 1973) ("The minimum requirement . . . is for the agency to supply a statement of reasons why it believes that an impact statement is unnecessary")

Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029, 1039-40 (D.C. Cir. 1973) (per Leventhal, J.) ("an 'assessment' statement must provide convincing reasons why a construction project with 'arguably' potentially significant environmental impact does not require [an EIS] . . . First, did the agency take a 'hard look' at the problem, as opposed to bald conclusions . . . Second, did the agency identify the relevant areas of environmental concern?. . . . Third, as to problems studied and identified, does the agency make a convincing case that the impact is insignificant?")

Committee for Auto Responsibility v. Solomon, 603 F.2d 992, 1003 n. 46 (D.C. Cir. 1979) (per curiam), cert. denied, 445 U.S. 915 ("we deem it important that the agency state its reasons for not preparing an EIS")

Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982) (per Robb, J.) ("four criteria for reviewing an agency's decision to forego preparation of an EIS: (1) whether the agency took a 'hard look' at the problem; (2) whether the agency identified the relevant areas of environmental concern; (3) as to the problems studied and identified, whether the agency

statement of reasons why there will be no significant en-

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made a convincing case that the impact was insignificant, and (4) if there was impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum")

Sierra Club v. Peterson, 717 F.2d 1409, 1413 (D.C. Cir. 1983) (per Mackinnon, J.) (reaffirms "four-part test" of *Cabinet Mountains, supra*)

Sierra Club v. United States Dep't. of Transportation, 753 F.2d 120, 127 (D.C. Cir. 1985) (per Bork, J.) (reaffirms "four criteria")

Foundation on Economic Trends v. Heckler, 756 F.2d 143, 151, 154 (D.C. Cir. 1985) (per Wright, J.) ("traditional norms of reasoned decisionmaking . . . 'hard look' . . . provide sufficient evidence and analysis," reaffirming *Cabinet Mountains* and *Sierra Club v. Peterson*)

First Circuit

Commonwealth of Massachusetts v. Watt, 716 F.2d 946, 951 (1st Cir. 1983) ("EA did not contain enough information or analysis to inform the Secretary of the magnitude of the change in environmental harm")

Sierra Club v. Marsh, 769 F.2d 868, 880, 881 (1st Cir. 1985) ("We find the explanations offered by the agencies as to why these impacts are not significant unpersuasive . . . conclusion . . . is not supported or explained")

Second Circuit

Hanly v. Mitchell, 460 F.2d 640, 647 (2nd Cir. 1972), cert. denied, 409 U.S. 990 ("perfunctory and conclusory language simply does not suffice")

Hanly v. Kleindienst, 471 F.2d 823, 834, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 ("a finding in the matter by GSA is essential . . . In view of the Assessment's failure to make findings . . . we remand the case")

Harlem Valley Transportation Ass'n v. Stafford, 500 F.2d 328, 337 (2d Cir. 1974) (agency "decision on this matter must be sufficiently reasoned so that a reviewing court can determine whether or not it was arbitrary or capricious")

Town of Orangetown v. Gorsuch, 718 F.2d 29, 35 (2d Cir. 1983), cert. den., 465 U.S. 1099 ("whether the environmental impact assessment contains the type of reasoned elaboration required . . . 'hard look' . . . whether the agency has convincingly documented its determination of "no significant impact")

vironmental impact. The court of appeals has expressly rejected

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Third Circuit

Township of Lower Alloways Creek v. Public Service Elec. & Gas Co., 687 F.2d 732, 741 (3d Cir. 1982) ("whether an 'agency has supplied convincing reasons why potential impacts are truly insignificant'")

Fourth Circuit

City of Alexandria v. Helms, 728 F.2d 643, 647 (4th Cir. 1984) (agency "carefully assessed the . . . impact on energy consumption and air quality")

Fifth Circuit

Save Our Wetlands, Inc. v. Sands, 711 F.2d 634, 644 (5th Cir. 1983) ("If the agencies engaged in this analysis and reasonably concluded on the basis of their findings . . .")

Citizen Advocates for Responsible Expansion, Inc. v. Dole, 770 F.2d 423, 434 (5th Cir. 1985) ("mere perfunctory or conclusory language will not be deemed to constitute an adequate record and cannot serve to support the agency's decision not to prepare an EIS. *Maryland-National Capital Park & Planning Commission v. United States Postal Service*, 487 F.2d 1029, 1039 & 1040 (D.C. Cir. 1973) . . . an agency's decision not to file an EIS will be analyzed on the basis the the agency's findings . . .")

Fritiofson v. Alexander, 772 F.2d 1225, 1236 (5th Cir. 1985) ("An EA . . . should also be sufficient to demonstrate reasoned decision making. See *Foundation on Economic Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985). . . . '[a]n [EA] that fails to address a significant environmental concern can hardly be deemed adequate for a reasoned determination that an EIS is not appropriate'")

Sixth Circuit

Crounse Corp. v. I.C.C., 781 F.2d 1176, 1193-94 (6th Cir. 1986), cert. den., 479 U.S. 890 ("'hard look,'" citing *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1983); "the most thorough analysis possible")

Boles v. Onton Dock, Inc., 659 F.2d 74, 76 (6th Cir. 1981) ("a well reasoned determination")

Pacific Legal Foundation v. Andrus, 657 F.2d 829, 841 (6th Cir. 1981) ("The purpose of requiring a statement of reasons is to evaluate whether the agency's decision is arbitrary and whether or not it is supported")

the holdings of all these circuits.

The court of appeals declined to follow these established principles of judicial review. Relying solely on a misinterpretation of *Camp v. Pitts*, 411 U.S. 138, 142-43 (1972) (*infra*, 9a), the court held that the agency need not articulate its findings or rationale. Rather, the court of appeals held that the question on judicial review is "whether, under the appropriate standard of review, the determinative finding in the MFR is sustainable on the administrative record made" (*infra*, 9a). Rejecting the

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Seventh Circuit

City of West Chicago, Illinois v. United States Nuclear Regulatory Comm'n, 701 F.2d 632, 651 (7th Cir. 1983) ("NRC explained the reasons for its determination")

Van Abbema v. Fornell, 807 F.2d 633, 637 (7th Cir. 1986) (Corps "substantially evaluated possible threats to public health and safety . . . made rational decisions")

Ninth Circuit

Foundation for North American Wild Sheep v. United States Dep't of Agriculture, 681 F.2d 1172, 1178 (9th Cir. 1982) ("prime statement of reasons . . . failed to address certain crucial factors")

The Steamboaters v. Federal Energy Regulatory Comm'n, 759 F.2d 1382, 1393 (9th Cir. 1985) ("agency must supply a convincing statement of reasons why potential effects are insignificant")

Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986) ("agency must provide a reasoned explanation of its decision")

Save the Yaak Committee v. Block, 840 F.2d 714, 718 (9th Cir. 1988) ("convincing statement of reasons")

LaFlamme v. Federal Energy Regulatory Comm'n, 852 F.2d 389, 399 (9th Cir. 1988) ("convincing statement of reasons")

Tenth Circuit

Sierra Club v. Hodel, 848 F.2d 1068, 1093 (10th Cir. 1988) ("We agree with the Ninth Circuit's view," citing *LaFlamme* and *Steamboaters, supra*)

Eleventh Circuit

Manasota-88, Inc. v. Thomas, 799 F.2d 687, 691 (11th Cir. 1986) ("articulated a rational connection between the facts found and the choices made")

direction given by this Court in *Baltimore Gas,* the court of appeals ruled that the "appropriate standard of review" is whether "the agency has considered the environmental consequences before taking action" (*infra,* 13a). The court of appeals has thus eliminated the fundamental precepts that the agency "disclose . . . the environmental impact of its actions and that its decision is not arbitrary or capricious," and that the agency "articulate . . . a rational connection between the facts found and the choice made." *Baltimore Gas, supra,* 462 U.S. at 97-98, 105.

The reliance by the court of appeals on *Camp v. Pitts,* 411 U.S. 138, 142-43 (1972), for the proposition that the agency need not state its reasons for its finding of no significant impact is misplaced. First, *Camp v. Pitts* concerned the National Bank Act, which requires no findings (411 U.S. at 140). Later NEPA decisions in *Kleppe, Baltimore Gas* and *ONRC* establish the agency's duty to articulate a rational connection between the facts found and the choice made under NEPA. Second, aside from NEPA, the question whether the agency must articulate its rationale was not before this Court in *Camp v. Pitts.* The court of appeals in *Camp* had ruled that "the Comptroller's ruling was 'unacceptable' because 'its basis' was not stated with sufficient clarity to permit judicial review," a ruling which was not even challenged in this Court. 411 U.S. at 139-40. This court could not, and did not, rule that, even aside from NEPA, the agency need not articulate its findings and rationale with clarity. Rather, this Court decided that, if further explanation of the Comptroller's rationale was needed, then the trial court should not hold a trial to determine the Comptroller's reasoning, but rather "the comptroller's decision must be vacated and the matter remanded to him" (411 U.S. at 143), a remedy which petitioners seek here.

The need to articulate the reasons why each of the various environmental impacts will not be significant is vital in NEPA litigation. It is the agency head (or his agent)—not the staff file

clerks who gather thousands of documents—who must determine that the air pollution impact, the surface water run-off impact, and other impacts will not be significant. It is his finding of no significant impact and his rationale, not a warehouse of documents, which must be set forth in a form which permits knowledgeable review by the courts. Further, NEPA requires disclosure of the environmental impacts and the official's findings to the public, in a form which enables the public to assess the findings and respond. Finally, the environmental consequences of the proposed action must be before the agency official, and in a form which enables them to be considered by him, when he makes his ultimate "public interest" decision (*e.g.*, to grant or deny a permit).

Nevertheless, the court of appeals ruled that the District Engineer need not even make any findings, much less articulate his reasons for his conclusion that the revised project will not cause any significant impact. The Corps has complied with NEPA, according to the Eighth Circuit, if the administrative record indicates that the staff has "considered" such matters as air pollution, water pollution, and the like.[8] The Ninth Circuit has pointed out that a consequence of the Eighth Circuit's rule is that

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[8] The court of appeals asserted (*infra*, 13a) that "the sheer volume of the administrative record in this case is evidence that the Corps gave environmental effects the type of consideration required under NEPA," citing *Baltimore Gas*, 462 U.S. at 98. The court of appeals misread page 98, and stopped short of page 99. All this Court said about the "sheer volume" was that it was "impressive." This Court held:

> "Of far greater importance, the Commission's Statement of Consideration . . . shows that it has digested this mass of material and disclosed all substantial risks.

Thus the court of appeals erroneously directed its attention to the mass of documents collected, instead of the District Engineer's written statement, which is required to set forth the findings and reasons for the conclusion that there will be no significant impact.

> the basis for [the agency's] conclusion that the project will not significantly affect the quality of the human environment, and therefore not require preparation of an EIS, can only be ascertained by reviewing the voluminous agency record. This kind of speculation regarding the basis for an agency's decision not to prepare an EIS is precisely what NEPA was intended to prevent.

LaFlamme v. Federal Energy Regulatory Comm'n, 852 F.2d 389, 399 (9th Cir. 1988).

Not having required findings, and not having required a reasoned explanation, the court of appeals altogether avoided the question whether the agency's explanation (dispensed with) is reasonable, and whether the necessary findings (dispensed with) are supported by the evidence. Thus the court of appeals upheld the determination of no significant impact notwithstanding the District Engineer's explicit refusal to assess the air pollution impact (*infra*, 53a-54a), his failure even to address surface water run-off (*infra*, 48a-55a), his refusal to assess the cumulative impacts of the stadium proposal and the remainder of St. Louis County's Master Plan to develop the 22,000 acres of floodplains and wetlands known as Missouri Bottoms (*infra*, 54a), and his failure to assess the traffic impact in Maryland Heights and elsewhere (*infra*, 52a-53a), which, according to the only expert who studied it, will be "disastrous" (II Tr. 123).

This decision is not a harmless aberration. It authoritatively reaffirms a series of decisions in which the Eighth Circuit has evolved its own standard of judicial review of NEPA cases, without regard to applicable decisions of this Court and the other circuits. Throughout this decade, the Eighth Circuit has stated that, in reviewing a determination not to prepare an EIS, the court will look only to determine that the agency "considered" a subject of environmental concern. The Eighth Circuit has not demanded that the agency explain its reasoning, or that the explanation make sense, or that the findings be sup-

ported by the evidence. *E.g., Ringsred v. Duluth,* 828 F.2d 1305, 1307 (8th Cir. 1987); *Olmsted Citizens for a Better Community v. United States,* 793 F.2d 201, 204 (8th Cir. 1986); *Winnebago Tribe of Nebraska v. Ray,* 621 F.2d 269, 272 (8th Cir. 1980), cert. den., 449 U.S. 836. In their briefs and petition for rehearing before the Eighth Circuit, petitioners urged the court of appeals to reject these prior declarations as dicta, and join the other circuits in applying the principles set forth by this Court, but the court of appeals emphatically affirmed its own rule of judicial review in NEPA cases.

This unique Eighth Circuit rule bars judicial review of an arbitrary, irrational agency decision, based on no findings at all, or on findings contradicted by all the evidence available, if the agency collects documents to support the proposition that the agency "considered" the impacts complained of by the public. This is a radical rule, abrogating the responsibility of the judiciary to protect the people from arbitrary agency action.

2. The court of appeals also erred in its corollary, or alternative, holding that "the initial burden of proof is upon the challenging party to demonstrate that there were facts omitted from the administrative record which, if true, would show that the permitted project could have a substantial impact on the environment" (*infra,* 12a). Ruling that petitioners had failed to sustain that burden, the court of appeals declined to "reach the question of whether the agency's decision not to prepare an EIS was reasonable"[9] (*infra,* 13a).

This Court has not countenanced the erection of such a barrier to the courthouse. If a plaintiff is aggrieved by agency ac-

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[9] Some courts of appeals have utilized the "reasonableness" standard, and some the "arbitrary and capricious" standard, in reviewing agency determinations of no significant impact. See *Gee v. Boyd,* 471 U.S. 1058, 1059-60 (1985) (White, J., dissenting). In this case, the court of appeals declined to "reach the question," however it may be formulated.

tion, the door to the courthouse is opened by the Administrative Procedure Act, 5 U.S.C. §§ 702, 704, 706. This Court has ruled simply that the validity of an agency's refusal to prepare an EIS "properly is before us, for the petitioners [government officials] have made it clear they do not intend to prepare such a statement." *Kleppe v. Sierra Club,* 427 U.S. 390, 409 (1976). Similarly, in *ONRC* this Court did not demand "facts omitted from the administrative record," but instead reviewed the validity of the Corps' explanations of its reasons for determining that no supplemental EIS was required, on the basis of evidence in the administrative record. 57 U.S.L.W. at 4509-11.

The Eighth Circuit alone raises this barrier to judicial review. This rule conflicts not only with the applicable decisions of this Court, but also with the decisions of all other circuits. For example, none of the cases cited in note 6, *supra,* acknowledges any such barrier to judicial review.

The party challenging an agency determination not to prepare an EIS has never been required to demonstrate *to the reviewing court* that facts "omitted from the administrative record" would show that the project could have a significant impact. In the proceedings *before the agency,* a person who contends that an EIS is required bears the burden of directing the agency's attention to the possibility of a significant impact. If he fails to "inform the [agency] of the risk," on judicial review the court may refuse to set aside the agency's determination of no significant impact. *E.g., Glass Packaging Institute v. Regan,* 737 F.2d 1083, 1093 (D.C. Cir. 1984), cert. den. 469 U.S. 1035. Cf. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519, 553 (1978). However, if that potential impact has been brought to the attention of the agency, then the agency must evaluate it, and on judicial review the burden rests on the agency to "make a convincing case that the impact is insignificant." *Maryland-National Capital Park & Planning Comm'n v. U.S. Postal Service,* 487 F.2d 1029, 1040 (D.C. Cir. 1973). The only "burden" which the plaintiff bears

on judicial review is "the initial burden of alleging facts that show that a project would affect significantly some human environmental factor." *CARE v. Dole,* 770 F.2d 423, 432 (5th Cir. 1985). The plaintiff can allege facts included in the administrative record, or facts "omitted from the administrative record," or both. The ruling of the court of appeals, that plaintiffs must demonstrate facts "omitted from the administrative record," is wholly incompatible with fundamental principles of administrative law and of NEPA.

This incompatibility may be illustrated by two hypothetical cases:

a. A diligent citizen puts his evidence before the agency, and demonstrates a significant environmental impact, but the agency arbitrarily decides there will be none. On judicial review, that citizen cannot demonstrate facts "omitted from the administrative record," so the Eighth Circuit will not "reach the question" whether the agency decision was arbitrary or capricious.

b. A lethargic citizen, or Johnny-come-lately, puts nothing before the agency, but in court demonstrates facts "omitted from the administrative record," showing the possibility of a significant impact. He receives a full-scale review.

A rule which penalizes diligence and rewards lethargy has little appeal. See *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 553 (1978). Cf. *Glass Packaging Institute v. Regan,* 737 F.2d 1083, 1093 (D.C. Cir. 1984), cert. den. 469 U.S. 1035.

This incompatibility is also illustrated by the plain facts of this case. The District Engineer declined to assess the air pollu-

tion impact (*infra,* 53a-54a),[10] and altogether failed to mention the impact of surface water run-off into the wetlands (*infra,* 48a-55a),[11] but nevertheless determined that no EIS is required.[12] Because the plaintiffs had, in the court's view, failed to demonstrate facts "omitted from the administrative record," the court of appeals refused to review whether the District Engineer's determination was arbitrary or capricious.

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[10] The former Staff Director of the Air Conservation Commission of Missouri testified without contradiction that the revised project may have a major impact in emission of ozone precursors and would delay attainment by the St. Louis Air Quality Control Region of the ozone national ambient air quality standards.

[11] The FWS official testified, and all agreed, that placing a parking lot for 9900 vehicles in the floodplain, surrounded by wetlands, would present the potential for serious impacts (Tr. 192-94). However, this potential is not mentioned in the District Engineer's MFR (*infra,* 48a-55a). At the trial, the District Engineer testified that he expected that his successor would do something about this, but he did not know what (VI Tr. 29-33, 77-78).

[12] The procedural rulings of the court of appeals also enabled that court to avoid ruling on plaintiffs' other claims. For example, the District Engineer made no effort to assess the traffic impacts in nearby communities, notwithstanding the undisputed testimony of plaintiffs' expert that a 70,000 seat stadium in this location, with extremely limited road access, would bring "disaster" in those communities. Nor did he consider the alternative downtown sites for a stadium advanced by civic leaders. He refused to assess the cumulative impact of this revised project and other existing and planned projects to complete St. Louis County's Plan to develop the entire 22,000-acre Missouri Bottoms, notwithstanding the testimony of the St. Louis County Executive that "the stadium complex would become the hook" for development of the floodplains and wetlands immediately south of Riverport (IX AR 5017), and notwithstanding the demands for an EIS made by all four interested agencies with environmental expertise (FWS, EPA, Missouri Department of Natural Resources and Department of Conservation) (I Tr. 184, 189; IV Tr. 21; I AR 300, 301, 314; Jt. Exs. 1181, 1246).

Like the first of the Questions Presented, this decision is not a capricious aberration, but is rather the authoritative affirmation of a consistent line of Eighth Circuit decisions, carving out for the Eighth Circuit alone a unique rule, drastically curtailing judicial review. Since 1980 the Eighth Circuit has been steadily and explicitly evolving this rule, as the court of appeals stated. *Infra,* 12a. *Ringsred v. Duluth,* 828 F.2d 1305, 1307 (8th Cir. 1987); *Olmsted Citizens for a Better Community v. United States,* 793 F.2d 201, 204 (8th Cir. 1986); *Winnebago Tribe of Nebraska v. Ray,* 621 F.2d 269, 271 (8th Cir. 1980), cert. den., 449 U.S. 836. The validity of this rule, and the binding force of those prior Eighth Circuit decisions, were fully argued in the Eighth Circuit. In its brief the Department of Justice vigorously asserted that this anomalous rule is the rule in the Eighth Circuit. The Eighth Circuit unqualifiedly reaffirmed this rule as a settled rule of its peculiar NEPA jurisprudence.

The unique rule evolved by the Eighth Circuit insulates from judicial review the most arbitrary and capricious of agency decisions, even those dependent on findings flatly contradicted by the evidence. Although for the moment this rule appears to be confined to NEPA litigation, it signals a broad retreat from the fundamental norms of judicial review established by this Court in *Securities and Exchange Commission v. Chenery Corp.,* 318 U.S. 80, 87, 90 (1943). The decision effectively ends judicial review of agency determinations not to prepare an EIS in the Eighth Circuit. Given the disposition of the Corps and many other agencies toward NEPA, the decision substantially devitalizes NEPA in the Eighth Circuit.

CONCLUSION

To bring order to the law of judicial review in NEPA cases, and to uphold the rule of law in the Eighth Circuit, this Court should issue the writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1382

Missouri Coalition for the Environment, a corporation; League of Women Voters of St. Louis County, a corporation; League of Women Voters of St. Louis, a corporation; The Open Space Council for the St. Louis Region, a corporation; Lee Streett; Martin E. Gardner, Jr.; Cornelius Alwood; Donald F. Weiler; Stanley J. Adams; and Beverly Toner,

Appellants,

v.

Corps of Engineers of the United States Army; John O. Marsh, Jr., Secretary of the Army; Robert K. Dawson, Assistant Secretary of the Army for Civil Works; Lt. Gen. E.R. Heiberg, III, Chief of Engineers; Col. John H. Atkinson, III, District Engineer of the Kansas City District, Corps of Engineers; Sverdrup Corporation, a corporation; Riverport, Inc., a corporation; and Riverport Associates, a limited partnership,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

(Submitted: November 14, 1988)

(Filed: January 27, 1989)

Before FAGG and WOLLMAN, Circuit Judges, and WOODS,* District Judge.

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* The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas, sitting by designation.

WOODS, District Judge.

The Missouri Coalition for the Environment, the individual plaintiffs and the organizational plaintiffs, collectively referred to herein as the "Coalition," appeal from a final judgment of the district court[1] upholding defendant United States Army Corps of Engineers' decision not to revoke, suspend or modify a permit issued to the non-government defendants under Section 404 of the Clean Water Act of 1977 (Federal Water Pollution Control Act Amendments of 1972), 33 U.S.C. §1344, which authorized the discharge of dredged or fill material into a wetland area. The district court rejected the Coalition's challenges brought under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 *et seq.*, and under various other environmental statutes and regulations, finding that the decision of the Corps was not arbitrary, capricious, unreasonable or otherwise not in accordance with law. We affirm.

BACKGROUND

Because the district court's exhaustive findings of fact and conclusions of law are reported in *Missouri Coalition for the Environment, et al v. Corps of Engineers of the United States Army, et al*, 678 F.Supp. 790 (E.D.Mo. 1988), the relevant facts need not be restated in great detail here. In 1983 defendants Riverport Associates, a limited partnership, Riverport, Inc., its general partner, and Sverdrup Corporation, a developer, proposed to construct a commercial-retail-industrial park of a nonspecific nature to be known as "Riverport." The Riverport site is located within a 22,000 acre floodplain north of the City of St. Louis, Missouri near the junction of the Missouri and Mississippi Rivers. The floodplain, commonly referred to as the Missouri River Bottoms, presently contains various agricultural

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[1] The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

and wetland areas. Originally the Riverport plans included construction of a 4,100-foot levee to protect the development from a 500-year flood — an 800-foot section of which was to be built across a wetland area. And since construction of this 800-foot section involved the discharge of fill material into a wetland, Riverport Associates was required to apply to the Corps for a section 404 permit.[2] With the exception of this permit requirement, there was no other federal involvement with the project.

In considering the permit application, the Corps initially conducted an evaluation and environmental assessment (EA) of the proposed Riverport development. The EA concluded with a finding that construction of the levee could have no significant effect on the quality of the human environment.[3] Based on this finding, the Corps' District Engineer determined that the permit could properly be issued without first preparing an Environmental Impact Statement (EIS).[4] The Section 404 permit was thus issued by the Corps on May 16, 1985.

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[2] Section 404 of the Clean Water Act of 1977, 33 U.S.C. §1344, forbids discharge of dredged or fill materials into "navigable waters" —defined as "waters of the United States" —unless authorized by the Army Corps of Engineers. Fresh water "wetlands" are within this definition and thus are subject to the Corps' jurisdiction. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); 33 C.F.R. §323.2(a) (1987) and 33 C.F.R. §328.3(b) (1987).

[3] An EA is a brief document which addresses the question whether a project subject to a permit requirement could have significant effects on the environment. The EA must conclude either with a determination that an Environmental Impact Statement is required, or with a finding of no significant impact (FONSI). 33 C.F.R. Part 230, Appendix B, §8(a) (1987).

[4] *See* Section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), which requires all agencies of the federal government to include in every recommendation or report on proposals for "major federal actions significantly affecting the quality of the human environment" a detailed Environmental Impact Statement.

In November, 1985 defendant St. Louis County, wherein Riverport is located, announced its intention to purchase 100 acres within Riverport. The purpose of this acquisition was to allow St. Louis County to substitute a domed football stadium for certain of the originally planned retail, commercial and industrial facilities. In accord with its intention, St. Louis County asked the Corps to reevaluate the issuance of its Section 404 permit to determine whether the substitution would require the permit to be revoked, suspended or modified under the Corps' regulations.[5] Acting on this request the Corps solicited evidence and opinions from the parties, private organizations, individual experts, local government officials, state agencies and federal agencies as to what effects the proposed stadium would have on the environment. The reevaluation process consumed a total of sixteen months and generated an administrative record weighing 66 pounds. There was testimony that this was the most comprehensive reevaluation undertaken by the Kansas City District in at least the last ten years.

On June 22, 1987 a "Memorandum For Record" (MFR) was issued to record the results of the District Engineer's revaluation. As stated in the MFR, if the District Engineer determined that there was a significant increase in the scope of the permitted activity, the changed circumstances and conditions would require that a new permit application be processed.[6] But if there was no significant increase, then the reevaluation would be limited to the question of whether modification, revocation or suspension of the permit was required given considerations of

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[5] 33 C.F.R. §325.7 (1987) permits the district engineer to reevaluate the "circumstances and conditions of any permit" and "initiate action to modify, suspend or revoke a permit as may be made necessary by considerations of the public interest."

[6] *See* 33 C.F.R. §325.7(a) (1987) (significant increases in scope of permitted activity will be processed as new applications).

the public interest.[7] The MFR indicates that the District Engineer found, first, that the addition of a stadium to Riverport did not significantly increase the scope of the permitted activity, which was filling of wetlands; and, second, that the potential impacts of the revised project were substantially similar to those evaluated prior to issuance of the original permit. Based on these findings, he then concluded that the changed circumstances did not require that the permit be modified, suspended or revoked. It is this decision which permitted St. Louis County to proceed with its plan to construct a domed stadium.

In response the Coalition filed this action in the district court on July 30, 1987 seeking declaratory and injunctive relief which would, if granted, prevent construction of the proposed stadium. Its primary allegation was that the Corps' reevaluation violated NEPA's requirement that an EIS be prepared for major federal actions significantly affecting the environment. But also alleged were violations of the Clean Water Act (CWA), 33 U.S.C. §§1344 and 1365; the Fish and Wildlife Coordination Act of 1934 (FWCA), 16 U.S.C. §662; the Endangered Species Act (ESA), 16 U.S.C. §1531 *et seq.*; the Clean Air Act (CAA), 42 U.S.C. §7506; and regulations promulgated pursuant to each act. In addition, review was sought under the Administrative Procedures Act (APA), 5 U.S.C. §701 *et seq.*

The district court conducted a five-day bench trial, at the conclusion of which it held in favor of the defendants on all claims. Specifically, the district court ruled that the Coalition had failed to meet its threshold burden of proof under NEPA, in that it did not raise a substantial environmental issue based on facts which were omitted from the record of the administrative proceedings. The district court also found that the Corps' decision not to revoke, suspend or modify its permit was not reviewable under the APA but, even if it was, the decision was not ar-

[7] *See supra*, n.5.

bitrary, capricious or otherwise not in accordance with law. The remaining claims were all found to be without merit and are not at issue here.

On this appeal the Coalition advances several bases for reversal. At the outset, it maintains that this case is moot and that the decisions below should be vacated because, subsequent to the trial, the St. Louis football franchise moved to Phoenix, Arizona. In the alternative, the Coalition argues that the MFR was an inadequate decisional document upon which the Corps' determination could be upheld; that the district court improperly excluded certain intra-agency communications from its review of the administrative record; that the district court applied the wrong standard of review under NEPA and that the district court erroneously concluded that the Corps had complied with NEPA's procedural requirements. The Coalition also argues that the Section 404 permit, by its own terms, does not permit stadium construction, that it is in violation of a local zoning ordinance and that it is in violation of Missouri's implementation plan for the enforcement of federal air pollution standards.

I. MOOTNESS

The Coalition urges us to hold that issues concerning the proposed addition of a domed football stadium to Riverport are moot because the St. Louis Football Cardinals have, since the trial, moved to Phoenix, Arizona. They state that the Corps had relied on representations made by the defendants to the effect that Mr. Bidwill, owner of the Cardinals, was willing to execute a lease for the proposed Riverport Stadium and that private financing was already in place. But, the Coalition argues, because the Cardinals have left St. Louis, the Corps' reevaluation no longer has an impact on anybody who is presently planning, or is in a position to build a Riverport stadium. They reason that, since the likelihood of building a stadium is contingent upon the remote possibilities of attracting

investors and a new franchise, and because construction is, at best, years away when relevant circumstances may have changed, the case is moot and the decisions below should be vacated.

We disagree with the Coalition's position and hold that this case "fits well within the classic exception to the mootness doctrine for disputes which are 'capable of repetition, yet evading review.' " *Thomas v. Bennett*, 856 F.2d 1165, 1168 (8th Cir. 1988) (citations omitted). In the absence of a class action, the capable of repetition exception applies if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1981); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). We are satisfied that both of these conditions have been met.

St. Louis County has purchased, and still owns the proposed stadium site. In addition, it represents to this court that it is actively pursuing stadium development for Riverport and is seeking a National Football League expansion franchise to locate there. These representations, standing alone, may not be sufficient to support a finding that there is a present, live controversy between the parties, but when considered in overall context it becomes clear that such a controversy does indeed presently exist. *Cf. Cedar-Riverside Environmental Defense Fund v. Hills*, 560 F.2d 377 (8th Cir. 1977) (but for intervening municipal legislation, promoter's express intent to seek financing and developer's intent to proceed with construction would have been sufficient to present a live controversy).

There is more than a reasonable likelihood that the Coalition, or those having identical interests, will pose continuing legal challenges to prevent construction of the proposed stadium. The Coalition does not dispute that it, or those in privity with it, have already challenged the proposed stadium in three separate lawsuits, and that they have organized a "No Dome" commit-

tee in opposition to the proposed stadium. Furthermore, the Coalition admits that there is "concerted, unanimous opposition of the business and civic leaders of the St. Louis Community" to construction of a stadium anywhere but in downtown St. Louis.

If we were to hold this case moot now, the very real prospect of litigation would hang like a dark cloud over the negotiations between St. Louis County and potential NFL franchisees. The defendants note that the sixteen-month reevaluation and the lengthy district court proceedings have already contributed to the loss of the Cardinals Franchise. By using the threat of protracted litigation, calculated to have the maximum disruptive effect on negotiations, the Coalition would be able to accomplish indirectly what it has not been able to achieve directly in the proceedings below. And it would be able to do so time and again without judicial review because, according to the Coalition's argument, each time it succeeded in scaring off a potential franchise the case would again become moot.

Moreover, the Corps' reevaluation was concerned only with the potential environmental effects of a generic, domed stadium. The Corps' decision that a domed stadium would have no impact on the environment materially different from the proposed industrial park did not depend on the Cardinals or any other specific team inhabiting that stadium. The Corps has ruled that its 1985 permit does not foreclose construction of a stadium; the defendants intend to build a stadium and the Coalition intends to oppose it. The Cardinals' departure does not alter this set of circumstances, and it does not moot this case. There is, accordingly, a present, live controversy before us. *E.g., Thomas v. Bennett, supra; Clark v. Brewer*, 776 F.2d 226 (8th Cir. 1985); *In Re Martin*, 761 F.2d 472 (8th Cir. 1985); *Terry v. Penn Central Corp.*, 668 F.2d 188 (3rd Cir. 1981).

II. NEPA

A. The Administrative Record

The Coalition argues that the administrative "record" on which we must base our review is the MFR issued by the District Engineer to record the results of his evaluation. And, because the MFR does not contain a "convincing statement of reasons why potential environmental effects are insignificant," the Corps' decision not to prepare an EIS must be found to be unreasonable. As a corollary to that argument, the coalition complains also that the district court erred in allowing testimony to "explain" the MFR because it was tantamount to post-hoc rationalization which defeats NEPA's purpose of insuring informed, well-considered environmental decisions before the fact. These arguments are easily rejected.

Both of the Coalition's arguments are premised upon the false assumption that our judicial review is limited to an examination of the six-page MFR. However, the question before us is not, as the Coalition urges, whether the MFR contains the requisite convincing reasons to stand on its own, but whether, under the appropriate standard of review, the determinative finding in the MFR is sustainable on the administrative record made. *Camp v. Pitts*, 411 U.S. 138, 142-43 (1972). And that record includes the MFR, the EA and the full ten volumes of documents compiled during the Corps' reevaluation process.

In attempting to sort out and wade through the voluminous administrative record, it was not an abuse of the district court's discretion to allow testimony of an explanatory nature. *Sierra Club v. U.S. Army Corps of Engineers*, 771 F.2d 409, 413 (8th Cir. 1985) (citations omitted). The district court did not attempt to try the administrative proceedings *de novo*, but properly confined its inquiry to the question of whether the Corps' decision was reasonable, based upon the administrative record. *See* 678 F.Supp. at 800 (The question is whether a reasonable person could reach the same result the Corps reached *on the*

same evidence.) (emphasis added). Since the district court did not create a "new record" on which to base its findings, we find no error. *Sierra Club, supra.*

With respect to the state of the record, the Coalition argues that the district court erroneously denied its motion to compel the Corps to produce requested documents. The documents in question concern certain intra-agency recommendations and preliminary decisions made by agency personnel in connection with the Corps' 1985 decision that an EIS need not be prepared. But because the propriety of the original permit was not before the district court, we find no abuse of discretion in denying the Coalition's discovery motion.

The Coalition presented its challenge to the original permit in an earlier lawsuit referred to herein as *Riverport I. See* 678 F.Supp. at 796. In that case the Coalition's claims regarding the domed stadium were dismissed without prejudice because the Corps had not yet completed its reevaluation. However, "all claims" against the original permit were dismissed with prejudice pursuant to a consent decree signed by the parties and approved by the court.[8] As a result, the Coalition is barred by

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[8] The relevant portion of the consent decree provides:

> When the Corps makes its final determination on the reevaluation, this Consent Decree and Judgment shall not be deemed to bar any future litigation concerning the Corps' determination with respect to the domed sports stadium or related parking lots outside the Riverport levee.
>
> Plaintiffs' rights to assert all claims and allegations concerning the stadium and related parking lots outside the Riverport levee are preserved, however, allegations and claims directed to both Riverport (the original permit, including the modification thereto as provided in Paragraph 7 herein) and the stadium shall be preserved only to the extent directed to the stadium and related parking lots outside the Riverport levee.
>
> . . . .
>
> Except as provided . . . above, all claims asserted in plaintiff's complaint . . . are hereby dismissed with prejudice.

principles of *res judicata* from asserting claims related to issuance of the original Riverport permit. *See Brooks v. Barbour Energy Corp.*, 804 F.2d 1144 (10th Cir. 1986) (settlement agreement approved by court with prejudice is *res judicata* to later lawsuit based on same occurrence). The documents the Coalition would have included in the record did not concern the question considered by the Corps on reevaluation — whether there would be a significant increase in the scope of the permitted activity — but rather concerned the wisdom of the Corps' initial decision to issue a permit. It was well within the district court's discretion to refuse to compel their production.

B. Standard of Review

NEPA requires preparation of an EIS only if the responsible federal agency determines in the first instance that a "major federal action" will "significantly affect the quality of the human environment." 42 U.S.C. §4332(2)(C); *Ringsred v. Duluth*, 828 F.2d 1305, 1307 (8th Cir. 1987); *Olmstead Citizens for a Better Community v. United States*, 793 F.2d 201, 204 (8th Cir. 1986). The Corps presumed in this case that issuance of a Section 404 permit was a major federal action.[9] 678 F.Supp. at 799. But it determined from its original evaluation and EA that granting the Section 404 permit for the originally proposed Riverport project would not have a significant effect on the quality of the human environment. And, on reevaluation, the Corps concluded that the addition of a domed stadium to Riverport would not alter that determination since the addition would not have an environmental impact materially different from the originally proposed commercial-industrial-retail park. Accordingly, an EIS was never prepared and the Corps decided that the addition of a stadium did not require the original permit

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[9] *See* 40 C.F.R. §1508.18(b)(4) (1987), Regulations of the Council on Environmental Quality, which includes projects "approved by permit" within the definition of "Major Federal Action."

to be revoked, suspended or modified.[10] The Coalition takes exception to these decisions and argues that NEPA required preparation of an EIS under the facts of this case.

The standard under which we review an agency's decision that preparation of an EIS is not required by NEPA is well settled. The initial burden of proof is upon the challenging party to demonstrate that there were facts omitted from the administrative record which, if true, would show that the permitted project could have a substantial impact on the environment. *Ringsred v. Duluth, supra* at 1307; *Olmstead Citizens for a Better Community, supra* at 204; *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 271 (8th Cir.), *cert. denied,* 449 U.S. 836 (1980); *Minnesota Public Interest Research Group v. Butz*, 498 F.2d 1314 (8th Cir. 1974 (en banc). If such facts are established, and they are of sufficient significance to warrant shifting the burden of proof, the agency must then demonstrate that its negative determination was reasonable under the circumstances. *Id.* The test is one of reasonableness — not whether the agency's determination was arbitrary, capricious, an abuse of

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[10] We agree with the district court that a decision not to modify, suspend or revoke a Section 404 permit is one committed to the Corps' absolute discretion and, as such, it is not reviewable under the Administrative Procedures Act, 5 U.S.C. §701(a)(1)(2). *Heckler v. Chaney*, 470 U.S. 821 (1985) (decision not to enforce is generally committed to agency's absolute discretion and is presumptively unreviewable under APA); *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402 (1970) (discretionary decisions unreviewable where statute so broad that in a given case there is no law to apply). In reaching this conclusion we find, as did the district court, that neither the Corps' regulations nor the Clean Water Act mandate issuance of a permit or the reevaluation of same. *See Harmon Cove Condominium Ass'n, Inc. v. Marsh*, 815 F.2d 949 (3rd Cir. 1987) (§404 of CWA and 33 C.F.R. §325.7 promulgated thereunder authorize discretionary Corps action). *Cf. Dubois v. Thomas*, 820 F.2d 943 (8th Cir. 1987) (§505(a)(2) of CWA); *Woodsmall v. Lyng*, 816 F.2d 1241 (8th Cir. 1987) (§501, *et seq.* of Housing Act of 1949); *Hill v. Group Three Development Corp.*, 799 F.2d 385 (8th Cir. 1986) (§8 of Housing Act of 1937).

discretion or otherwise not in accordance with law. *Minnesota Public Interest Research Group, supra* at 1320.

NEPA is an essentially procedural act designed to insure that the responsible federal agencies make fully informed and well-considered environmental decisions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1977); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1979). It does not require that agencies reach decisions that we, as judges, would have reached had we been members of the decision-making unit of the agency. *Id.* Rather, the court's only role is to insure that the agency has considered the environmental consequences before taking action. *Strycker's Bay, supra* at 227; *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976). Thus, if the challenging party is unable to meet its initial burden of proof — to demonstrate that the agency failed to consider facts which, if true, would show that the permitted project could have a substantial effect on the environment — we need not reach the question of whether the agency's decision not to prepare an EIS was reasonable.

The record demonstrates that the Coalition failed to sustain its burden. The sheer volume of the administrative record in this case is evidence that the Corps gave environmental effects the type of consideration required under NEPA. *Baltimore Gas & Electric Co. v. NRDC, Inc.*, 462 U.S. 87, 98 (1983). But of more importance is what the record shows. The Corps considered twenty-eight different environmental and other impacts potentially associated with the proposed stadium. 678 F.Supp. at 801. This consideration took into account the views of the Coalition and its experts, private organizations, the Environmental Protection Agency, the Fish and Wildlife Service, the Emergency Management Agency, the National Park Service, the Missouri Department of National Resources, the Missouri Department of Commerce, the Missouri Highway Traffic Commission, the Missouri Attorney General's Office and the officials of surrounding municipalities. In all, the

Corps reviewed twenty-two depositions, thousands of documents and held what amounted to a "seven-month public hearing." 678 F.Supp. at 796-97.

On the surface the Coalition appears to argue that the Corps did not fully consider traffic and safety impacts, air pollution, surface runoff, cumulative impacts of related developments, controversial effects, alternatives to the Riverport site and economic impacts. On closer examination, however, these arguments actually take issue with the "correctness" of the Corps conclusions, not with the procedural adequacy of the Corps' consideration. *See Olmstead Citizens for a Better Community v. United States*, 793 F.2d 201, 207, n.8 (8th Cir. 1986) (the question is whether an agency "considered" environmental effects, not the "correctness" of the decision). The record is replete with evidence that each of these issues was before the Corps. As to most of the issues raised, there was testimony from not only the Coalition's own experts but from neutral government agencies. In any event, the record does not support the assertion that the Corps failed to fully consider these impacts. Because the Coalition has failed to meet its threshold burden in this regard, we need not address the matter further.

III. LAWFULNESS OF STADIUM PROPOSAL

The last argument advanced by the Coalition on this appeal is that the stadium proposal is unlawful in three respects. First, the Coalition claims that the proposed stadium exceeds the activities authorized by the Section 404 permit which allows filling of wetlands incident to construction of an "industrial park." We agree with the defendants' contention that this argument is frivolous. The activity permitted by the Corps is not the construction of an industrial park or a stadium; it is the filling of wetlands necessary to construct an 800-foot section of the levee. The substitution of a stadium for some unspecified industrial facility does not change the scope of that activity. Moreover, the original EA contemplated that "entertainment facilities"

would be a part of Riverport. Clearly, a football stadium is an entertainment facility.

Second, the Coalition argues that the proposed stadium is prohibited by a local zoning ordinance. But the Coalition does not allege that deviation from the local ordinance will necessarily affect the "quality of the human environment." *Olmstead Citizens for a Better Community v. United States*, 793 F.2d 201, 207 (8th Cir. 1986). "In other words, to the degree that a given zoning ordinance reflects social and economic, rather than ecological, considerations, uses contrary to the ordinance do not implicate the concerns underlying NEPA." *Id.* Because the Coalition does not allege that the zoning ordinance is premised on ecological considerations, it has not stated a claim cognizable under NEPA. And because the Section 404 permit expressly provides that it "does not obviate the requirement to obtain state or local assent required by law," the alleged zoning violation has no relevance to our decision.

Finally, the Coalition claims that the proposed stadium violates the air pollution standards set forth in the Missouri State Implementation Plan for Ozone (SIP). *See* Environmental Protection Agency Regulations at 40 C.F.R. §51.18(a) (1986). This argument is without merit. The Corps specifically asked the Environmental Protection Agency (EPA), which is charged with the responsibility for implementing the Clean Air Act, 42 U.S.C. §7401, *et seq.*, whether automobile emissions associated with the proposed stadium were regulated by the Missouri SIP. The EPA responded in the negative. Moreover, the state agency which implements the SIP raised no objections related to air pollution even though it expressed concern with respect to five other environmental issues. We find under these circumstances that the Coalition has shown no violation of NEPA or the Clean Air Act.

Accordingly, the judgment of the district court is affirmed.

FAGG, Circuit Judge, dissenting.

I believe the dispute we are called on to decide in this case has become moot.

The United States Army Corps of Engineers (the Corps) determined that altering the Riverport project plans to include a domed stadium did not require the Corps to change its earlier permit allowing St. Louis County to develop the project without an environmental impact statement. The court suggests the Corps' decision "was concerned only with the potential environmental effects of a generic, domed stadium [and] * * * did not depend on the Cardinals or any other specific team inhabiting that stadium." *Ante* at 8-9. I disagree.

The Corps' Riverport permit decision was triggered by the presence and real commitment of the St. Louis Cardinals football team. With the relocation of the football Cardinals while this appeal was pending, and with no replacement football team on the horizon, the factual predicate for the Corps' administrative decision no longer exists. Due to this change in the essential nature of the dispute that precipitated the Corps' challenged action, I believe the appeal before us presents a purely abstract question and not a live case or controversy.

I also disagree with the court's assessment that the circumstances of this case fit within the exception to the mootness doctrine for controversies that are " ' "capable of repitition, yet evad[e] review." ' " *Ante* at 7 (quoted citations omitted). I have no quarrel with the idea that this controversy may resurface in the years to come. Even so, I see nothing about the process for obtaining the Corps' decision (one way or the other) on the environmental impact statement that makes the process so transient that its "short duration" will inherently escape judicial review. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). On the contrary, if the county attracts another professional football team to occupy a domed stadium within the original Riverport project, there will be ample opportunity for the parties to seek review of an administrative decision that will then be based on current facts and circumstances.

To allow review now on a theory that "a football team is a football team is a football team" in my view ignores the true character of this facet of the project as it was submitted to the Corps — that a professional football franchise was then ready and financially prepared to occupy the stadium under specific conditions. I am not willing at this point to presume those conditions had no effect on the Corps' permit decision or that different variables some time from now likewise will have no impact on future Corps permit determinations.

In sum, the football Cardinals are out of the Riverport project picture, and there is no understudy "anchor tenant" waiting in the wings. Obtaining a replacement team that is willing to commit itself to a domed stadium within the Riverport project is currently a matter of conjecture at best, *see SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 406 (1972). The key reason for considering a variance from the Corps' original permit has disappeared. Consequently, the specific dispute that was put before the Corps by the supporters and opponents of a domed stadium is now moot. This being so, I would remand the case to the district court for an order directing the Corps to vacate its challenged permit decision. *See A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329, 331 (1961); *Hollister Ranch Owners' Ass'n v. FERC*, 759 F.2d 898, 901-02 (D.C. Cir. 1985).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1397C(3)

Missouri Coalition for the Environment, et al.,
Plaintiffs,

v.

Corps of Engineers of the United States Army, et al.,
Defendants.

MEMORANDUM

(Filed: January 8, 1988)

This matter is before the Court to determine the merits of plaintiffs' claim after a five-day trial before the Court sitting without a jury.

INTRODUCTORY SUMMARY OF CLAIMS

Plaintiffs filed a complaint against several private entities, federal officials, and the Corps of Engineers of the U.S. Army ("Corps") seeking declaratory and injunctive relief with respect to the process used in and the outcome of the Corps' re-evaluation of a permit originally issued by the Corps under §404 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1344, to defendant Riverport Associates in May 1985. The original permit allowed certain activities, not expressly including nor prohibiting construction of a stadium, by the private entity defendants on part of the Missouri River Bottoms floodplains, including some wetlands, in St. Louis County, Missouri ("the Riverport area"). The original permit was modified on March 4, 1987. The Corps' re-evaluation at issue here resulted in a "Memorandum of Record," issued June 22, 1987, that essentially allows the construction of a domed

stadium, and related parking facilities, in the Riverport area pursuant to the original permit — without the processing of a new application for a permit, and without suspension, modification, or revocation of the original permit. Plaintiffs allege that the Corps' re-evaluation involved violations of Sections 404 and 505 of the FWPCA, 33 U.S.C. §§1344 and 1365;[1] the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §4321, et seq.; the Fish and Wildlife Coordination Act of 1934 ("FWCA"), as amended, 16 U.S.C. §662; the Endangered Species Act ("ESA"), 16 U.S.C. §1531, et seq.; the Clean Air Act ("CAA"), 42 U.S.C. §7506(c); and the regulations promulgated pursuant to each Act. In particular, plaintiffs contend the Corps failed properly to evaluate traffic congestion and safety factors, air pollution factors, surface water run-off from the parking lots, regional economic impacts, and the cumulative impact of the purportedly piecemeal implementation of St. Louis County's plan to develop the Missouri Bottoms. Additionally, plaintiffs urge the Corps should have prepared an Environmental Impact Statement.

Defendants, including St. Louis County which intervened as a defendant, deny liability, and urge the Corps' re-evaluation was not either unreasonable or arbitrary and capricious.

The principal question presented here is whether or not the Corps acted arbitrarily, capriciously, or unreasonably concerning the environment in this cause. The answer is no.

Having carefully considered the pleadings, testimony, exhibits, stipulations, memoranda, and relevant record, the Court makes and enters the following findings of fact and conclusions of law.

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[1] The claim under this statutory provision was dismissed by order dated November 23, 1987. A claim that defendants' conduct may violate local zoning ordinances was also dismissed by that order.

Findings of Fact

1. Plaintiff Missouri Coalition for the Environment ("Coalition") is a corporation organized and existing under the Illinois not-for-profit corporation laws, with its principal office in Missouri.

2. Plaintiff The City of St. Louis is a municipal corporation within the Eastern District of Missouri organized and existing as a constitutional charter city pursuant to the Missouri Constitution.

3. Plaintiff League of Women Voters of St. Louis County is a corporation organized and existing under the general not-for-profit laws of the State of Missouri, maintaining its principal office in St. Louis County, Missouri.

4. Plaintiff The League of Women Voters of St. Louis is a corporation organized and existing under the general not-for-profit laws of the State of Missouri.

5. Plaintiff The Open Space Council for the St. Louis Region is a corporation organized and existing under the not-for-profit corporation laws of the State of Missouri, with its principal office in the City of St. Louis, Missouri.

6. Plaintiff Lee Streett is a resident, property owner, and taxpayer of St. Louis County, and a former member of the Board of Directors of plaintiff Coalition.

7. Plaintiff Martin E. Gardner, Jr., is a resident, property owner, and taxpayer of St. Louis County, and a former President of the Open Space Council.

8. Plaintiff Cornelius Alwood is a resident of St. Louis County, Missouri.

9. Plaintiff Donald F. Weiler resides in the City of Maryland Heights, Missouri, which is in St. Louis County.

10. Plaintiff Stanley J. Adams resides in the City of Bridgeton, Missouri, which is in St. Louis County.

11. Plaintiff Beverly J. Toner resides in Maryland Heights, Missouri. She is a property owner and taxpayer of St. Louis County.

12. Plaintiff Mark D. Conner is a resident, property owner, and taxpayer of the City of St. Louis, Missouri.

13. A. Defendant Corps is an agency of the United States and a branch of the United States Army.

B. Defendant John O. Marsh, Jr., is the duly appointed and acting Secretary of the Army.

C. Defendant Robert K. Dawson was in 1986 the duly appointed and acting Assistant Secretary of the Army for Civil Works.

D. Defendant Lt. Gen. E.R. Heiberg, III, is the duly appointed and acting Chief of Engineers of the Corps.

E. Defendant Robert M. Amrine was in 1985, 1986, and the first half of 1987, the duly appointed and acting District Engineer for the Corps, Kansas City District (hereinafter "district engineer"). Defendant John H. Atkinson, III, is his successor in that office.

These defendants are hereinafter sometimes collectively referred to as the "Corps defendants." In relevant part, the Corps defendants, pursuant to delegations of authority by Congress and by regulation, are charged with administration and enforcement of §404 of the FWPCA, 33 U.S.C. §1344, subject to the Guidelines of the United States Environmental Protection Agency.

14. Defendant Riverport, Inc. and defendant Sverdrup Corporation are corporations incorporated under the laws of the State of Missouri. Defendant Riverport Associates is a Missouri

limited partnership. Defendant Riverport, Inc., is a general partner thereof. These defendants will be referred to collectively as "Sverdrup" or "the Sverdrup defendants."

15. Defendant St. Louis County, Missouri, is a first class county operating under a charter form of government within the Eastern District of Missouri. This defendant now owns the property on which the proposed stadium will be built.

16. In the course of the trial, plaintiffs' standing was conceded.

ADMINISTRATIVE PROCEEDINGS CONCERNING ORIGINAL PERMIT

17. On October 25, 1983, the Corps received a permit application from Riverport Associates in connection with the development known as "Riverport."

18. The Riverport site comprises approximately 450 acres in Western St. Louis County, Missouri, east of the Missouri River and south of I-70. This acreage contains wetlands and Missouri River floodplains commonly referred to as the Missouri Bottoms.

19. The Riverport development as originally planned was to include retail buildings, restaurants, entertainment facilities, office buildings, and industrial activities sharing a unified theme and plan.

20. The application stated that Sverdrup would be constructing a 4,100-foot-long levee designed to protect Riverport from a 500-year flood.

21. Because an 800-foot-long portion of the levee crossed some wetlands, the project required the Corps' approval prior to construction.

22. In relevant part, the aforementioned permit application was filed under Section 404 of the FWPCA (also referred to as

the Clean Water Act of 1977), 33 U.S.C. §1344, which requires a permit for the placement of fill in wetlands.

23. Upon review of the permit application, the Corps issued a public notice on January 20, 1984. The notice informed federal, state, and local agencies and the public of the Riverport permit application, and requested comments thereon.

24. Numerous federal, state, and local agencies, as well as private organizations and individuals, responded to the public notice.

25. The comments addressed a host of potential environmental, engineering, and planning concerns, including, without limitation, the following: wetlands, prime farmland, endangered species, flooding and floodplain management, alternatives, and cumulative impacts.

26. On June 25, 1984, the St. Louis County Council approved two ordinances rezoning the Riverport site for use as proposed. The zoning ordinances require Sverdrup to undertake a number of specific commitments, including those designed to minimize the impact of the new development on traffic.

27. On October 1, 1984, the Corps conducted a public hearing on the Riverport application.

28. A large number of agencies, organizations, and individuals spoke or submitted comments at and after the hearing. Among the organizations participating in the hearing were the Missouri Coalition for the Environment, the Open Space Council, and the League of Women Voters.

29. During the Corps' review, Sverdrup modified the design and construction plans for Riverport, reducing the amount of wetlands impacted from 28 to 2.8 acres. In addition, the modifications included Sverdrup's commitment to add an additional 10 acres of wetlands by purchasing a 10-acre parcel riverward of the Riverport levee and creating new, higher quality

wetlands there. As a result of the modifications, the Corps concluded that the wetland loss would be fully mitigated by increasing the existing wetland acreage, as well as by enhancing wetland quality and diversity. No other agency challenged that conclusion. The Fish and Wildlife Service of the Department of Interior ("FWS") expressly approved the mitigation proposal.

30. On April 19, 1985, the Missouri Department of Natural Resources ("MDNR") issued a "water quality certification" for Riverport in accordance with the Clean Water Act of 1977, 33 U.S.C. §1251, et seq.

31. Pursuant to a Memorandum of Agreement between the Departments of the Army and Interior under Section 404(q) of the Clean Water Act, 33 U.S.C. §1344(q), the FWS may "elevate" (appeal) a proposed decision of the Corps to issue a wetlands permit. When elevation is invoked, the final decision of the Corps may not rest with the District Engineer. Instead, his decision may be reviewed by higher level Army officials.

32. The FWS responded to the District Engineer's proposed decision by stating that the proposed permit conditions "will adequately mitigate for the project's impacts on fish and wildlife resources," so the FWS did not exercise its authority to require reconsideration of the District Engineer's decision by higher level Corps officials.

33. The Environmental Protection Agency ("EPA") stated no objection to the proposed issuance of the Riverport permit.

34. On May 1, 1985, the Corps completed its evaluation of the Riverport permit application, No. 2151, together with an Environmental Assessment ("EA") and Statement of Findings pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321, et seq. The Corps discussed the potential impacts of the Riverport project upon the environment, and specifically found that there would be no significant impacts. Therefore, the Corps concluded an Environmental Impact Statement ("EIS") was not required.

35. The Corps' District Engineer, Col. Robert M. Amrine, summarized as follows the findings of the Corps' public interest review, pursuant to Section 404 of the Clean Water Act and the Corps' regulations thereunder:

> I find that issuance of a Department of the Army permit to Riverport Associates as prescribed by regulations published in 33 CFR 320-330, is based on a thorough analysis and evaluation of the various factors enumerated above; that there are no reasonable alternatives available to the applicant that will achieve the purposes for which the work is being considered; that the work is in accordance with the overall desires of the public as reflected in the comments of State and local agencies and the general public; that the work is deemed to comply with established State and local laws, regulations, and codes; that there have been no identified, significant, adverse, environmental effects related to the work; that issuance of this permit is consonant with national policy, statutes, and administrative directives; and that on balance the total public interest should best be served by issuance of the Department of the Army permit.

36. The permit became fully effective on May 16, 1985, after it was signed by both Sverdrup and the Corps.

37. As originally issued, the Riverport permit authorized Sverdrup to discharge (a) approximately 53,600 cubic yards of fill material into wetlands for construction of an 800-foot-long portion of the 4,100-foot levee; (b) approximately 17 cubic yards of rock for construction of a stilling basin and outfall channel, and (c) a small quantity of fill for minor grading in wetland areas to improve drainage.

THE INCLUSION OF A DOMED STADIUM IN RIVERPORT

38. In early 1985, the County Executive of St. Louis County ("the County Executive") proposed that a domed stadium be built in St. Louis County to accommodate area sports concerns.

39. In February 1985, the County Executive approached Sverdrup to inquire whether it would be interested in redesigning the proposed Riverport development to include a domed stadium. Sverdrup indicated it was not interested in having such a stadium in Riverport.

40. In March 1985, the Corps asked Sverdrup whether its plans for Riverport had changed to include a stadium. On March 29, 1985, Sverdrup wrote to the Corps that it had no plans to include a domed stadium in Riverport.

41. The County Executive returned to Sverdrup and persisted with his proposal (by then in somewhat scaled-down form) for a stadium in Riverport.

42. On November 12, 1985, the Corps learned that St. Louis County ("the County") proposed to acquire property at the Riverport site for the construction of a domed stadium.

43. Following the County's announcement in November 1985 of its proposal for a domed stadium in Riverport, and the sale in December 1985 by Sverdrup to the County of 100 acres within Riverport, some opposition was heard.

44. As a result of the proposed inclusion of a domed stadium in Riverport, the Corps commenced a reevaluation of the circumstances and conditions of the original permit pursuant to the Corps' regulations, in particular 33 C.F.R. §325.7 (1987) ("reevaluation regulation").

45. Under the Corps' reevaluation regulation, both in language and in practice, the reevaluation process is extremely informal. There are no procedural requirements (such as notice and/or comment), and the method of proceeding is committed to the discretion of each District Engineer in each case of reevaluation.

46. The Corps requested additional information from Sverdrup concerning the proposed location of a stadium within

Riverport, and additional parking facilities outside and south of the Riverport levee.

47. Corps personnel inspected the site and identified several wetland areas south of the Riverport project location.

48. The County furnished a drawing of its plans to locate the stadium and adjacent parking, together with a letter asserting (a) its intention to avoid disturbance of wetlands in its siting of the parking facilities outside the levee; (b) existing roads were adequate to serve the stadium; and (c) a levee to protect the additional parking was not economically feasible since the probability of its flooding is remote.

49. A copy of the information supplied by Sverdrup and the County was furnished to the EPA, the FWS, the MDNR, and the Missouri Department of Conservation ("MDC").

50. During the reevaluation, the Corps examined the potential impacts of the proposed stadium, plus related parking facilities both inside the levee (within the 100 acres purchased by the County for the stadium) and outside the levee (approximately an additional 150 acres).

51. The Corps obtained numerous submissions from Sverdrup and St. Louis County, as well as extensive comments from federal, state, and local agencies, private organizations (including plaintiffs and their experts), and individuals.

52. Before the District Engineer reached a final decision on the stadium reevaluation, virtually the same plaintiffs as those herein (except for the City of St. Louis and four individuals), filed *Missouri Coalition for the Environment v. Corps of Engineers*, No. 86-2229C(2) (E.D. Mo., filed June 25, 1986) ("Riverport I"). That case was plaintiffs' initial judicial challenge to the issuance of the original permit and the proposed inclusion thereafter of a domed stadium. The Court in that case dismissed without prejudice plaintiffs' complaint to the extent it addressed the domed stadium proposal, on the ground

such a claim was not ripe for review because the Corps had not completed its reevaluation.

53. On March 4, 1987, in connection with the payment to plaintiffs of $100,000 and the settlement of the claims remaining in *Riverport I*, the Corps issued a permit modification authorizing the placement of fill in additional wetlands in connection with (a) the construction of a haul road used to bring in materials to build the levee, and (b) the widening of the Earth City Expressway near the entrance to Riverport. The modified permit also expanded upon and formalized a condition in the original permit that Sverdrup create 13, rather than 10, acres of new wetlands as mitigation for the wetlands being filled.

54. In the Consent Decree settling *Riverport I*, plaintiffs dismissed with prejudice any and all claims against the issuance of both the original Riverport permit and the above-mentioned permit modification. Plaintiffs also reserved the right "to assert all claims and allegations concerning the stadium and related parking lots outside the Riverport levee."

55. In the consent decree, the parties also noted:

> Special Condition WW [of the permit, as modified March 4, 1987] states: "The permittee agrees to ensure that the quality of water entering the wetland mitigation area will be such that it will not adversely affect the flora and/or fauna that inhabit the area." A question has arisen concerning the construction of such language. By means of clarification, the Corps intended in Special Condition WW that Sverdrup take all reasonable steps under its control to ensure that the surface water runoff from the Riverport project will not contain contaminants or pollutants in quantities sufficient to significantly threaten the existence of any portion of the wetland ecosystem.

56. In March 1987, Corps officials requested yet additional information concerning the possible need for additional road-

ways which might impact more wetlands, other developments that might be planned for the area, and air quality.

57. The Corps requested considerable information from Sverdrup and the County and received comments from, among others, numerous federal, state, and local entities (i.e., the FWS, the EPA, the Federal Emergency Management Agency, the National Park Service, the MDC, the MDNR, the Missouri Highway and Traffic Commission, the Missouri Attorney General's Office, the City of Florissant, St. Charles County, the City of St. Louis Community Development Agency, the Mayor of St. Louis, and the City of Maryland Heights). In addition, the Corps received substantial input from plaintiff organizations, and numerous other organizations and individuals.

58. The Corps considered the 22 depositions and thousands of documents and reports produced in *Riverport I*, which included plaintiffs' stadium claims, from the filing of the suit in June 1986 through the close of discovery in January 1987 when certain claims were dismissed for lack of ripeness.

59. The reevaluation process took some 16 months. This "informal" procedure, which ran from December 1985 through June 1987 (with a brief hiatus after *Riverport I* was initially filed), generated an administrative record of some 66 pounds.

60. Mel Jewett, Chief of the Corps' Regulatory Branch, testified on deposition that this was the most comprehensive permit reevaluation by the Kansas City District during at least the last 10 years.

61. In challenging the procedure utilized by the Corps in the present permit reevaluation, plaintiffs claim that there should have been a "public interest review," with a formal notice issued and comment invited.

62. Under the Corps' regulations, *see, e.g.*, 33 C.F.R. §§325.2, 325.3, a public interest review (which typically occurs when an initial permit application is filed), involves the issuance

of a "notice" to interested agencies and individuals and the submission of such written comments as those noticed may choose to offer. In this case, the Corps similarly invited comments from all interested parties and sent copies of key correspondence to them as well.

63. In the Corps' discretion, it may or may not also involve a public hearing. 33 C.F.R. §327.4 (1987). This case had what amounted to a seven-month public hearing, featuring not only lay speakers but a parade of experts (mostly plaintiffs'), providing deposition testimony and written reports and comments. All of the arguments raised by plaintiffs in this lawsuit, and portions of all of the experts offered by plaintiffs at trial, were considered by the Corps during the reevaluation process.

64. On June 22, 1987, the Corps issued a Memorandum for Record based on the District Engineer's conclusions, stating that the inclusion of a domed stadium within Riverport required neither a new permit nor a change in the existing permit. This Memorandum of Review constitutes final agency action within the meaning of the Administrative Procedure Act, 5 U.S.C. §704.

65. The reevaluation under 33 C.F.R. §325.7 (1987) consisted of a two-prong analysis: (a) whether there was a significant increase in scope of the permitted activity from the original permit, as modified, thereby requiring a new or separate permit, 33 C.F.R. §325.7(a)(1987); and (b) if not, whether action to modify, suspend, or revoke the existing permit was necessary, 33 C.F.R. §§ 325.7(b)-(d)(1987).

66. First, the Corps found that there was no significant increase in the scope of the permitted activity. The activity permitted under the Riverport permit was the placement of fill in wetlands, and neither the substitution of a stadium for other activities within Riverport, nor the addition of parking facilities outside the Riverport levee, involved the fill of any wetlands. Thus, a new permit was not required.

67. Second, the Corps found that the proposed changes in the Riverport project did not require a modification, revocation, or suspension of the Riverport permit because the potential environmental impacts of the revised project (the originally permitted activity with the proposed domed stadium included as part of the Riverport development) were substantially similar to those thoroughly evaluated prior to the issuance of the original permit.

68. In determining whether the permit should be modified, suspended, or revoked in the public interest, the Corps considered twenty-eight different environmental and other impacts.

69. The District Engineer concluded that the revised project would result in potentially significant changes in only two impacts, recreational and economic.

70. The proposed stadium project would shift the location of certain available recreation resources from downtown St. Louis to the Riverport site.

71. The Corps reviewed an economic study prepared by Team Four, Inc., and considered concerns expressed by the Mayor of the City of St. Louis.

72. The District Engineer concluded that adverse economic impacts felt in some locations are mitigated to some extent by the beneficial impacts occurring in others.

73. The District Engineer concluded that the change in economic and recreation impacts due to the revised project does not warrant modification, suspension, or revocation of the Riverport permit.

74. The Corps considered both practicable alternatives to the stadium itself and to the revised project as a whole.

75. The Corps concluded that there were no practicable alternative sites for the revised project.

76. The Corps considered fully the views of plaintiffs' traffic expert, Paul C. Box. The Corps reviewed his deposition in *Riverport I*, his initial written report, and his comments on reports submitted by Sverdrup's expert and St. Louis County.

77. The Corps also considered a report prepared for Sverdrup by Wilbur Smith & Associates, an independent consultant with a national reputation in traffic engineering, and a separate report submitted by the St. Louis County Department of Highways.

78. The Corps then asked the Missouri Highway and Traffic Commission ("MHTC") for its evaluation of the conflicting conclusions of the experts. MHTC agreed with Sverdrup's consultant and the County that the existing road network, plus improvements thereto already underway, would adequately serve the traffic generated by the stadium.

79. It is noteworthy that the many traffic experts are in substantial agreement concerning the underlying data. They diverge only in the conclusion they draw from the data.

80. Considering all the foregoing reports, the District Engineer determined that the existing road system, augmented by the improvements to I-70 which the State is about to make, the improvements to the I-70 interchange and a portion of the Earth City Expressway that are part of the original Riverport project, and the use of traffic management plans for stadium events will provide minimally acceptable road access to the revised project.

81. The Corps also considered the potential cumulative effects of the Riverport project in light of past, present, and reasonably foreseeable future projects in the area.

82. The Corps noted that each of the reasonably foreseeable future projects in the general area (i.e., roadway improvements involving Route 115, Page Avenue, and the Earth City Expressway) are or will be subject to extensive environmental review.

83. With respect to the air quality impacts of the revised project, the Corps considered the facts that the St. Louis area has not yet attained federal limitations for the pollutant ozone, and that automobile emissions are a source of ozone pollution.

84. The Corps also reviewed information on air quality provided by the Missouri Coalition for the Environment, its expert witness, and St. Louis County.

85. Both the Corps and the Coalition provided information on air quality to the EPA, which is the federal agency responsible for implementing the Clean Air Act.

86. EPA responded to the Corps' inquiries concerning air quality by stating that there are no regulations at the federal level that control indirect sources of air pollution such as automobile emissions, and that the Missouri State Implementation Plan places no restriction on indirect sources of air pollution.

87. The District Engineer concluded that he would not modify, suspend, or revoke the existing permit based on air quality.

88. The Coalition wrote to the EPA outlining the Coalition's air quality concerns and asking it to take all steps necessary to assure that the Riverport permit is revoked.

89. The EPA did not assert its veto authority concerning either the issuance of the original Riverport permit or the Corps' decision on reevaluation. Although the Corps is the federal agency charged with issuing or denying permits for projects affecting wetlands, the EPA may override the Corps' decision if the proposed activity "will have an unacceptable adverse effect" on the environment. 33 U.S.C. §1344(c).

90. The Corps contacted the National Park Service ("NPS") and confirmed that the Riverport development would not have an adverse impact on the Lewis and Clark Trail.

91. The Corps looked at the impacts of floodplain development and concluded that the addition of the stadium did not result in significant impacts on the floodplain.

92. There is conflicting testimony of record as to the importance of the St. Louis County area as a bald eagle habitat. One of the conditions of the original permit, a condition not changed through any modification or revision of the project insofar as the available record indicates, states:

> The permittee agrees to minimize disturbance to bald eagle populations that may use the forested area adjacent to the Missouri River by: (1) limiting construction of the outfall channel to the spring and summer months; (2) minimizing the clearing of large trees in this area; and (3) siting industrial or commercial activities nearest this area that would create the least traffic and human activity.

93. The District Engineer determined that the existing permit would remain in effect and did not require modification, suspension, or revocation as a result of the proposed stadium project.

94. The proposed issuance of the original Riverport permit was presumed to be a major federal action, and the Corps prepared an EA. As a result of the EA, the Corps found that the permit would not create significant environmental impacts and, therefore, an EIS was not prepared.

95. In *Riverport I*, plaintiffs challenged the adequacy of the Riverport EA and claimed that an EIS should have been prepared. They later, on payment of $100,000, dismissed those claims with prejudice.

96. In this case, by contrast, no Corps permit was issued or even modified. The Corps simply conducted an informal proceeding known as a "reevaluation" and determined that the substitution of a domed stadium for unspecified retail-commercial-industrial activities required neither a new permit

nor a modification, revocation, or suspension of the existing permit.

97. Although the Corps' reevaluation regulation has no procedural mandates, and vests broad discretion in each District Engineer to handle each proceeding as he sees fit, the Corps in this case conducted a comprehensive review. The material issues raised by plaintiffs in this suit were considered by the Corps during the reevaluation process, which generated the weighty administrative record said to contain 66 pounds. The opinion of the experts named by the plaintiffs in this case were reviewed by the Corps during its permit reevaluation. Colonel Amrine, a First Division Infantry veteran of the Vietnam War, gave able and persuasive testimony concerning the Corps' thorough evaluation of all concerns. His impartiality was clear and unquestioned.

98. Did the Corps act arbitrarily, capriciously, or unreasonably in issuing its reevaluation decision? The thoroughness and breadth of the Corps' review — particularly in light of the complete lack of formal procedural requirements — precludes plaintiffs from sustaining their rigorous burden of proof.

Upon review of the reevaluation record and other relevant information here, it is not possible to find the Corps acted in an arbitrary, capricious, or unreasonable manner in reaching its reevaluation decision.

Plaintiffs offer criticism of the action or inaction of the Corps, EPA, FWS, MDNR, MDC, MHTC, FEMA, NPS, and St. Louis County government. It is a healthful American trait to distrust government agencies — but to distrust them all at once?

CONCLUSIONS OF LAW

A. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321, et seq., is essentially a procedural statute,

which seeks to ensure agency consideration of the environmental impact of a proposed action. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) (per curiam).

B. NEPA does

> not require agencies to elevate environmental concerns over other appropriate considerations . . . . Rather, it require[s] only that the agency take a "hard look" at the environmental consequences before taking a major action . . . . The role of the courts is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.

Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-98 (1983) (citations omitted).

C. Section 102 of NEPA requires the preparation of an environmental impact statement (EIS) for any major federal action significantly affecting the quality of the human environment. 42 U.S.C. §4332(2)(C).

D. Because the only reason Sverdrup required the original Riverport permit was to fill certain wetlands, and because the substitution of a stadium for other uses involved no additional wetlands fill, no separate permit was found to be required. Because the potential environmental impacts of the revised project were determined not to be appreciably different from those of the original project, the Corps found the existing permit need not be modified, revoked, or suspended. The original decision is not now before the Court and the Corps' reevaluation decision worked no change in the status quo.

The test is not whether this Court would have reached the same result on the same evidence. The question is whether a reasonable person could reach the same result the Corps reached on the same evidence. The Court finds one could.

E. The Corps reasonably concluded under the reevaluation regulation that the revised project would not "significantly increase the scope of the permitted activity" and therefore would not require a new permit, 33 C.F.R. §325.7(a) (1987).

F. Even assuming NEPA applies, judicial review of an agency's compliance therewith is narrowly circumscribed:

> NEPA, while establishing "significant substantive goals for the nation" imposes upon agencies duties that are "essentially procedural." . . . *[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences*; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."

Strycker's Bay Neighborhood Council, Inc., supra, 444 U.S. at 227-28 (emphasis added) (quoting from *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) and from *Kleppe v. Sierra Club,* 427 U.S. 390, 410 n.21 (1976)).

G. Where a proposed action, such as the issuance of a permit, is a "major federal action," the question for the agency is whether the action will significantly affect the quality of the human environment, and, therefore, require the preparation of an EIS. When an agency determines that a proposed major federal action will not significantly affect the environment and, therefore, that an EIS is not required, the question for the reviewing court is whether the agency's determination was reasonable. *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 271 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980).

H. Before the court need address the question of reasonableness, however, the burden is on the plaintiff to make a threshold showing that the agency failed to consider facts which, if true, would constitute a substantial impact on the environment. *Id.*

I. Plaintiffs, in challenging the Corps' decision not to prepare an EIS, bear the burden of raising a substantial environmental issue based on facts which were omitted from consideration in the administrative record. *Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201 (8th Cir. 1986).

J. In this case, the Corps considered an extremely broad range of environmental impacts potentially associated with Riverport prior to issuing the EA, statement of findings, and permit in May 1985. The issues of alternative sites, cumulative impacts, and secondary impacts such as traffic, air pollution, and economic impacts were addressed by the Corps during its lengthy review of the original Riverport permit application.

K. In this case, the Corps' jurisdiction under Section 404 of the Clean Water Act extends only to wetlands. The Corps' jurisdiction was originally invoked because of an 800-foot portion of a 4,100-foot levee (which has already been constructed under the May 1985 permit). Moreover, although the levee was necessary for the Riverport project, the revision of the project to substitute a domed stadium for unspecified commercial-industrial activities on 100 of the project's 500 acres involves no filling of wetlands. Nevertheless, the Corps went far beyond its limited jurisdiction and considered the environmental impacts of the entire Riverport project, both originally and as revised. In light of these facts, the plaintiffs have not sustained their threshold burden of raising "a substantial environmental issue." *Winnebago Tribe of Nebraska v. Ray*, *supra* 621 F.2d at 271.

L. Under Section 701(a) of the Administrative Procedures Act, judicial review is not available to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. 5 U.S.C. §701(a)(1)(2).

M. Section 701(a)(2) precludes judicial review of the Corps' inaction because an agency's decision not to take enforcement action is presumptively unreviewable by a court. *Heckler v. Chaney*, 470 U.S. 821 (1985).

N. Corps regulations grant the District Engineer the discretion to modify, suspend, or revoke a permit, but they do not mandate issuance of a new permit or modification of same. 33 C.F.R. §§325.7 amd 325.8(b)(1987).

O. Enforcement decisions under the Clean Water Act are committed exclusively to the discretion of the Corps. *Harmon Cove Condominium Ass'n, Inc. v. Marsh*, 815 F.2d 949 (3d Cir. 1987).

P. The Corps' decision not to require a new permit or revoke or suspend the existing permit is to be upheld unless proven to be arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §706(2)(A).

Q. The case of *First National Bank of Fayetteville v. Smith*, 508 F.2d 1371, 1376 (8th Cir. 1974), *cert. denied*, 421 U.S. 930 (1975), holds:

> "Administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis." . . . Something more than mere error is necessary to meet the test. . . . To have administrative action set aside as arbitrary and capricious, the party challenging the action must prove that it was "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case. . . ."

(citations omitted).

R. Great deference is accorded an administrative agency's interpretation of its own regulations. *See, e.g., Moore v. Custis*, 736 F.2d 1260, 1262 (8th Cir. 1984).

S. The Court does not substitute its judgment for that of the agency, and need only ascertain if there is a rational connection between the facts found and the choice made by the agency. *Corning Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 736 F.2d 479, 480 (8th Cir. 1984).

T. The Corps may rely on information provided by the permit applicant concerning its identification and analysis of alternative sites, so long as the agency verifies and evaluates that information. *See Friends of the Earth v. Hintz*, 800 F.2d 822, 834-35 (9th Cir. 1986) (agency's EA); *River Road Alliance, Inc. v. Corps of Engineers of U.S. Army*, 764 F.2d 445, 452-53 (7th Cir. 1985) (agency's analysis of alternative sites), *cert. denied*, 475 U.S. 1055 (1986).

> The Corps is not a business consulting firm. It is in no position to conduct a feasibility study of alternative sites. . . . the Corps has to depend on the parties for such information[.]

River Road Alliance, Inc., supra, 764 F.2d at 453.

U. In this case, the Corps reasonably evaluated the criteria selected for analyzing alternative sites. The Corps then considered eleven potential alternative sites for the entire project as well as two on-site alternatives and a no action alternative and six alternative sites for the stadium.

V. The Corps reasonably concluded that there is no practicable alternative site for the revised Riverport project.

W. The Corps is not required to deny a permit application simply because of any anticipated adverse impacts of future projects.

> Since any subsequent applicant . . . will have to get a Corps permit too, the Corps will be able to prevent the problem from getting out of hand.

Id. at 452.

X. The record here discloses the Corps evaluated the Riverport project in light of both existing and reasonably foreseeable future projects in the area.

Y. Plaintiffs also contend that the Corps did not adequately consider the potential secondary impacts of the Riverport

development — i.e., increased traffic, and the potential for increased air pollution related thereto.

Z. The record amply demonstrates that the Corps did, in fact, consider such potential impacts.

AA. In regard to traffic impacts, the Corps, relying in part on the objective analysis of the MHTC, made the judgment to accept the conclusions of Sverdrup's traffic expert and the St. Louis County Highway Department, rather than the views of plaintiffs' expert.

BB. Plaintiffs now ask this Court to substitute its judgment for the Corps'. That far exceeds the scope of review applicable here. The Corps' decision to accept the conclusions of these traffic experts was plainly not arbitrary, capricious, or unreasonable.

CC. The Corps should not base its permit decision on socioeconomic harms not proximately related to changes in the physical environment since it is not empowered to regulate economic competition between communities or to make political decisions as to which community's economic interests ought to be preferred. *Mall Properties, Inc. v. Marsh*, 672 F.Supp. 561 (D.Mass. 1987).

DD. The Corps' permit-processing regulations specify that when private entities apply for a permit, "it will generally be assumed [as the Corps did in this case] that appropriate economic evaluations have been completed, the proposal is economically viable, and is needed in the marketplace." 33 C.F.R. §320.4(q)(1987).

EE. Although prior to implementation of the above regulation, the following cases remain persuasive for the points that mere economic and social impacts are insufficient to require preparation of an EIS, *Como-Falcon Community Coalition, Inc. v. U.S. Dept. of Labor*, 609 F.2d 342, 345-46 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980); and socioeconomic im-

pacts are not to be considered unless there is a reasonably close causal relationship between such impacts and an impact on the physical environment. *Cf. Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773-74 (1983) (re health and psychological impacts); and *Olmsted Citizens for a Better Community, supra*, 793 F.2d at 204-05 (re socio-economic impacts). Here, the Corps' evaluation of the economic and recreation impacts (and all others) was not arbitrary, capricious, or unreasonable.

FF. As a matter of law, surface water runoff, such as from the stadium parking lots, is deemed "non-point source runoff," and is not subject to the permitting requirements of the Clean Water Act.

GG. This was made clear by Congress in the Act, 33 U.S.C. §§1311, 1314(f), 1362(12)(14), and consistently reaffirmed by the courts. *See, e.g., Sierra Club v. Abston Const. Co., Inc.*, 620 F.2d 41, 43 (5th Cir. 1980); *United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) (accelerated runoff of rain water from impermeable surface such as parking lot, carrying with it oil, lead, rubber particles, and other additives from vehicular traffic, is non-point source pollution subject only to analysis, study, and suggestions).

HH. The facts provided to the Corps, and the evidence adduced at trial, demonstrate that the Riverport project will not cause any nonconformance with Missouri's state implementation plans ("SIP"). Therefore, the Corps did not violate Section 7506 of the Clean Air Act, 42 U.S.C. §7506, in issuing the Riverport permit.

II. Section 7 of the Endangered Species Act instructs federal agencies, in consultation with the FWS, to ensure that their actions are not likely either (1) to jeopardize the continued existence of an endangered species, or (2) to destroy or modify adversely any critical habitat of an endangered species. 16 U.S.C. §1536.

JJ. Judicial review of an agency's compliance with the Endangered Species Act is governed by the arbitrary and capricious standard of the Administrative Procedures Act, 5 U.S.C. §706(2)(A). *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 686 (D.C. Cir. 1982).

KK. In this case, although the bald eagle may be present in the project area, the original Riverport project was determined to be not likely to jeopardize its continued existence. Moreover, permit conditions were incorporated in the Riverport permit to minimize any effect of the project on the bald eagle.

LL. There is no critical habitat of the bald eagle in the project area.

MM. The revision of the Riverport project to include a domed stadium causes no additional impacts, if any, to the bald eagle.

NN. The Corps acted in compliance with the Endangered Species Act, and did not act arbitrarily or capriciously in its reevaluation of the Riverport permit.

OO. Plaintiffs' reliance on the Fish and Wildlife Coordination Act ("FWCA"), 16 U.S.C. §661, et seq., is misplaced.

PP. There is no private right of action to enforce the FWCA. *Environmental Defense Fund, Inc. v. Alexander*, 501 F.Supp 742, 766-67 (N.D. Miss. 1980); *Trinity County v. Andrus*, 438 F.Supp. 1368, 1383 (E.D. Cal. 1977); *Sierra Club v. Morton*, 400 F.Supp. 610, 640 (N.D. Cal. 1975), *aff'd in part, rev'd in part on other grounds sub nom. Sierra Club v. Andrus*, 610 F.2d 581 (9th Cir. 1979).

QQ. Moreover, an agency's compliance with NEPA automatically satisfies the requirements of the FWCA. *State of Missouri ex. rel. Ashcroft v. Department of the Army, Corps of Engineers*, 526 F.Supp. 660, 677 (W.D. Mo. 1980) *aff'd on*

other grounds, 672 F.2d 1297, 1303 (8th Cir. 1982); *Enos v. Marsh*, 616 F.Supp. 32, 64-65 (D.Haw. 1984), *aff'd on other grounds*, 769 F.2d 1363 (9th Cir. 1985).

RR. Furthermore, the record shows the Corps consulted with the FWS. Plaintiffs' claims under the FWCA are without merit.

OBITER DICTA

Through evidence and argument it was urged upon the Court that:

(a) the stadium should be located in the downtown core of the metropolitan area;

(b) two stadia in one metropolitan area are unsuitable; and

(c) a stadium should not be placed in a floodplain.

Must we ignore as judges what we know as sports fans?

Kansas City, Missouri, has two stadia, built side by side.

Both are miles from the downtown core of the metropolitan area.

The Dallas Cowboys play in Irving, Texas.

The Detroit Lions play in Pontiac, Michigan.

New York professional football teams play in New Jersey.

It should be unnecessary to remind St. Louisans where the Minnesota Twins play.

It is not in Minneapolis or St. Paul.

The New Orleans Superdome is located in the downtown core of that metropolitan area.

It is also in the heart of a great floodplain.

A page of experience is worth a pound of logic. Justice Oliver Wendell Holmes, Jr. gave us this lesson over a century ago. O.W. Holmes, *The Common Law*, at 1 (1881).

Judges regularly urge jurors to take their common sense into their deliberations. Perhaps sometimes judges may do likewise.

Dated this 8th day of January, 1988.

/s/ Wm. L. Hungate
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1397C(3)

Missouri Coalition for the Environment, et al.,
Plaintiffs,

v.

Corps of Engineers of the United States Army, et al.,
Defendants.

JUDGMENT

(Filed: January 8, 1988)

This action came before the Court, the Honorable William L. Hungate, District Judge, presiding. The issues having been duly tried and resolved in accordance with an order and findings of fact and conclusions of law entered by the Court this date,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs take nothing by their cause of action against defendants, and the claims against defendants are dismissed on the merits at plaintiff's cost.

Eyvon Mendenhall, Clerk

By: /s/ Florence H. Guzenski
Deputy Clerk

Dated: January 8, 1988

Approved as to form this 8th day of January, 1988.

William L. Hungate
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 87-1397C(3)

Missouri Coalition for the Environment, et al.,
Plaintiffs,

v.

Corps of Engineers of the United States Army, et al.,
Defendants.

ORDER

(Filed: January 8, 1988)

Findings of fact and conclusions of law dated this day are hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiffs take nothing by their cause of action against defendants, and the claims against the defendants are dismissed on the merits at plaintiffs' costs.

Dated this 8th day of January, 1988.

/s/ William L. Hungate
United States District Judge

APPENDIX E

DEPARTMENT OF THE ARMY
Kansas City District, Corps of Engineers
700 Federal Building
Kansas City, Missouri 64106-2896

June 22, 1987

CEMRK-DE

MEMORANDUM FOR RECORD

SUBJECT: Reevaluation of DA Permit Number 2151 Issued to Riverport Associates

1. The purpose of this memorandum is to record the results of my reevaluation of the circumstances and conditions of the permit issued to Riverport Associates on 16 May 1985. That permit authorized the discharge of fill material into a wetland adjacent to the Missouri River in association with the construction of an 800 foot portion of a levee. My decision to issue the permit in May 1985 was based on all factors developed through a full public interest review as required by Federal Regulations 33 CFR 320-330.

2. The reevaluation of DA Permit Number 2151 was initiated because circumstances and conditions related to the authorized activity had changed since the permit was issued. The changed circumstances and conditions arose from a revision of the project whereby St. Louis County proposed to acquire 100 acres of the Riverport site for construction of a domed sports stadium and some related parking space. Prior to the County's proposal, the 100 acre site was to have been used for commercial/retail/industrial activities of a non-specific nature. Additional acreage adjacent to the Riverport site was to be acquired for the construction of supplemental parking space for the stadium. The additional acreage is part of the revised project because it is part of the stadium. The potential future construc-

tion by the County of a levee to provide enhanced flood protection for the parking space adjacent to the Riverport site was initially considered to be part of the revised project.

3. The reevaluation of the circumstances and conditions of the permit was undertaken to determine if there was a significant increase in scope of the permitted activity resulting from the revised project. If so, the changed circumstances and conditions would require that a new permit be processed for the activity. If there was no significant increase in scope of the permitted activity, then the reevaluation would determine if action to modify, suspend, or revoke the permit was necessary given considerations of the public interest.

4. 33 CFR 325.7(a) requires the processing of a new application for a permit when a significant increase in the scope of a permitted activity has occurred. The permitted activity originally authorized by DA Permit Number 2151 is: (1) the discharge of approximately 53,600 c.y. of fill material for construction of an 800 foot long portion of a levee; (2) discharge of approximately 17 c.y. of rock for construction of a stilling basin and outfall channel; and (3) discharge of a small unknown quantity of fill for minor grading in wetland areas to improve drainage in association with the construction of an industrial park within the levee. The authorized discharges are permitted in wetland areas adjacent to the right bank of the Missouri between river miles 29.6 and 29.9 in St. Louis County, Missouri. The construction of a domed stadium and some parking facilities on 100 acres of the Riverport site previously planned for commercial/retail/industrial use of a non-specific nature does not increase the scope of the permitted activity described above. The construction of additional parking facilities on land adjacent to the Riverport property to support the stadium does not increase the scope of the permitted activity since those parking facilities will be sited to avoid wetlands. The construction or improvement of a levee to protect the parking facilities located outside the Riverport levee does not increase the scope of the permitted

activity because St. Louis County has determined that the construction of the levee is not necessary and will not be undertaken as part of the project. Since there will be no placement of fill in wetlands resulting from the construction of the revised project, there is no significant increase in the scope of the activity permitted under DA Permit Number 2151 that would require the processing of a new application for a permit in accordance with 33 CFR 325.7(a) or 33 CFR 325.2.

5. 33 CFR 325.7(a) identifies five factors to be considered during a reevaluation of the circumstances and conditions of a permit. My reevaluation of DA Permit Number 2151 was conducted because circumstances and conditions relating to the permitted activity had changed since the permit was issued. This is one of the five factors identified in paragraph 325.7(a).

a. Three of the remaining four factors did not apply to this reevaluation. Those three factors are: the identification of significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect the plans, investment and actions that the permittee has made in reliance on the permit.

b. The extent of the permittee's compliance with the terms and conditions of the permit is the fifth factor identified in 33 CFR 325.7(a). This factor did not apply at the time the reevaluation was initiated. During the conduct of my reevaluation, the permittee's noncompliance with a portion of the permit was identified. The noncompliance was determined to be inadvertent and was not a significant factor in my reevaluation. Restoration and mitigation have been required for this noncompliance.

6. In considering the factor of changed circumstances and conditions, my reevaluation was designed to determine if the permit should be modified, suspended or revoked in the public interest.

Information was requested from the permittee and from St. Louis County to enable me to conduct the reevaluation. A partial summary of correspondence, meetings, and coordination activities is at Enclosure 1. To examine the potential impacts of the changed circumstances and conditions and to assist the balancing of issues in the public interest, a matrix was developed to compare the impacts addressed in the Environmental Assessment (EA) for the original project with the projected impacts of the revised project. The matrix is at Enclosure 2. The revised project would result in potentially significant changes in only two of the twenty-eight environmental impacts addressed in the EA. Those impacts are economics and recreation. All other environmental impacts are essentially the same as those discussed in the EA. The principal impact on recreation is to shift the location of certain available recreation resources from downtown St. Louis to the Riverport site. The recreation resources remain available to the general population. The principal economic impact is to be borne by private investors. When a project is financed by private funds, Federal regulations assume that appropriate economic evaluations have been made by the private sector and that the willingness of private interests to invest in the project indicates that the project is economically viable and needed in the marketplace. Economics and recreation are secondary impacts to the filling activity authorized by the permit. The adverse economic and recreation impacts that are felt in some locations are mitigated to some extent by the beneficial economic and recreation impacts occurring in other locations. In balancing the issues in the public interest and assessing my responsibilities under applicable regulations, I have concluded that the change of environmental impacts due to the revised project does not warrant modification, suspension or revocation of the Riverport permit.

7. There are four other items that were considered during my reevaluation. They are: practicable alternative sites for the project, highway access to the project, air quality, and the cumulative impacts of the project.

a. When the placement of fill in a special aquatic site is for a non-water dependent activity, it must be assumed that practicable alternatives exist. During my evaluation of the original permit application, I determined that there were no practicable alternatives that would achieve the purposes of the project. A discussion of alternatives examined during the processing of the original permit application is at paragraph 2.x. of the EA. I have considered the parameters for successful development of the revised project as presented by the applicant and have concluded that the parameters are reasonable. These parameters have not changed from those of the original project except for an increase in the number of acres required. There is no need to search for other possible sites since the original search was comprehensive enough to identify those sites that provide sufficient acreage for the revised project. None of the alternative sites with sufficient acreage meet the parameters necessary for the successful development of the revised project. Therefore, I have determined that there are no practicable alternative sites for the revised project.

b. The EA for the original project did not identify highway access as an impact because of the position of the State of Missouri as expressed by the Missouri Highway and Transportation Commission (MHTC) in their letter of 26 September 1984 (Enclosure 3). During my reevaluation, the Honorable John Scott provided me a copy of a letter (Enclosure 4 and 5) from the MHTC that appeared to contradict MHTC's 1984 letter. Discussions with the MHTC provided the following explanation: "If planned street and highway connections are completed with the proposed development of the area, it (the development) would be reasonably compatible with highway facilities serving the area." (Enclosure 6). Also, the County stated that no road improvements other than those planned as part of the original project would be required when the stadium is substituted for other commercial/retail/industrial activities at Riverport (Enclosure 7). Subsequently, the Missouri Coalition

for the Environment made available a study of the traffic impact associated with the revised project (Enclosure 8) that challenged the information provided by the State and the County. As a result, I requested additional information from the State and the permittee regarding the traffic impact of the revised project (Enclosure 9 and 10). That information was provided in a letter from the State dated April 30, 1987 (Enclosure 11), in two studies provided by the permittee (Enclosure 12 and 13), and in a letter from the State dated June 11, 1987 (Enclosure 14). In addition, I considered the information contained in letters from the Missouri Coalition for the Environment dated May 28, 1987 and June 10, 1987 (Enclosure 15 and 16). Additional information received from the Coalition's traffic consultant was also considered (Enclosure 17). Having considered the information received from these sources, and relying on the opinion of the MHTC, I have determined that the existing road system augmented by the improvements to I-70 which the State is about to make, the improvements to the I-70 interchange and a portion of the Earth City Expressway that are part of the original Riverport project, and the use of traffic management plans for stadium events will provide minimally acceptable road access to the revised project.

c. St. Louis County is in a nonattainment area for ozone as that term is defined in the Clean Air Act. During my reevaluation, I considered the fact that automobile emissions are a source of ozone pollution and I reviewed information on air quality provided by the Missouri Coalition for the Environment. I also reviewed an Air Pollution Analysis (Enclosure 18) prepared by St. Louis County and information provided by the Environmental Protection Agency dated March 30, 1987 and June 10, 1987 (enclosures 19 and 20). There are no regulations at the federal level that control indirect sources of air pollution such as automobile emissions at a stadium event. The State Implementation Plan places no restrictions on indirect sources of air pollution. Since agencies with responsibility for and special

expertise in air quality matters do not regulate indirect sources of air pollution, I have determined that it would be inappropriate for the Corps of Engineers to provide regulation through the Department of the Army regulatory program.

d. The National Environmental Policy Act regulations (40 CFR 1500 et seq.) define cumulative impacts as those which result "from the incremental impact(s) of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency . . . or person undertakes such other actions". I have considered the cumulative impacts of the revised project, including past actions in the same ecosystem and the potential future development of the Missouri River flood plain to the south and west of the Riverport site. I am aware that in 1969 St. Louis County prepared a Master Plan for development of the flood plain in this area and that area leaders have made numerous statements of intent to eventually develop this flood plain. The Master Plan and the statements generally reflect concepts of the possibilities for the area rather than a definitive plan for action. There are no proposals and no evidence of future proposals sufficient to characterize any of the concepts in the Master Plan or other plans commissioned by the county as reasonably foreseeable future actions. Several road improvements in the area (Route 115, Page Avenue, and the Earth City Expressway) were considered in regard to their cumulative impacts. These roadway improvements have been part of the long range plans for the area, have independent utility and, as discussed in paragraph 7 b, are not essential for the stadium. Route 115 has been the subject of an environmental assessment and the impacts of the Page Avenue extension are to be addressed in an Environmental Impact Statement. Neither the route nor the date of construction start for the extension of the Earth City Expressway to Page Avenue has been established. The eventual need for this extension was identified prior to the development of both the original Riverport project and the revised Riverport project. The impact of the construction of the

original Riverport project on the need for this road extension was considered during the public interest review for the original permit. The principal potential impact of the revised project may be to advance the eventual date of construction of this road extension. This road extension is not "reasonably related" to the revised project (33 CFR 325.1(d)(2)). The environmental documentation that will likely be required if and when this road extension project is designed and programmed for construction will provide adequate safeguards for wetlands and other environmental concerns. I have determined that the cumulative impacts that can be attributed to the revised project do not differ significantly from those attributed to the original project.

8. I have reviewed and considered all the information gathered to conduct my reevaluation. In addition, I have reviewed the Environmental Assessment and other information in the file of the original permit application. I have determined that the existing permit will remain in effect and does not require modification, suspension or revocation as a result of the changed circumstances and conditions associated with the revised project.

/s/ Robert M. Amrine
Colonel, Corps of Engineers
Commanding

20 Enclosures

APPENDIX F

DEPARTMENT OF THE ARMY
Kansas City District, Corps of Engineers
700 Federal Building
Kansas City, Missouri 64106

MRKOD-PP (2151)

ENVIRONMENTAL ASSESSMENT
RIVERPORT ASSOCIATES
FILL IN WETLANDS
MISSOURI RIVER MILE 29.6 TO 29.9
APPLICATION NO. 2151

1. Riverport Associates, 801 North 11th Street, St. Louis, Missouri 63101, has requested a Department of the Army permit to authorize the proposed placement of fill material in association with the construction of a levee and outfall structure on the right bank of the Missouri River and in adjacent wetlands. The proposed project is located between Missouri River miles 29.6 and 29.9, Township 46 north, Range 5 east, in St. Louis County, Missouri (Latitude: 38 45' 35" north — Longitude: 90 28' 56" west).

2. The following public interest factors were given careful evaluation in assessing the impacts of the project:

a. **Description of Proposed Work.**

(1) the applicant proposes to discharge fill material into a wetland area of approximately 49 acres in association with the construction of a levee to provide 500-year flood protection to a 500-acre tract of land. The tract is located along the right bank of the Missouri River between river miles 29.6 and 29.9, and adjacent to Interstate 70. The proposed development would include a 370-acre complex of which 190 acres would be served by rail. The remaining acreage would be set aside for levee protection, rail lines, roadways, watercourses, and a retention basin.

The commercial properties would include retail buildings, restaurants, entertainment facilities, office buildings, and an industrial area limited to warehousing and light manufacturing facilities.

(2) The regulated component of the development is the fill material, and as originally proposed, included the discharge of approximately 53,600 cubic yards of fill in a wetland in conjunction with the construction of 800 linear feet of a 4,100-foot levee and the construction of a 1,350-foot-long cast-in-place concrete box culvert connecting a retention basin to an outfall structure at the bank of the Missouri River. Approximately 135 cubic yards of backfill, used to cover the culvert, would be placed riverward of the ordinary high water mark (OHWM), elevation 439.2 feet, National Geodetic Vertical Datum of 1929 (NGVD). Significant portions of the backfill placed landward of the OHWM would be within an area determined to be a bottomland riparian (palustrine forested) wetland adjacent to the Missouri River.

(3) Subsequent to issuance of Joint Public Notice No. 2151 on 20 January 1984, the applicant has twice revised plans to minimize impacts to the identified wetlands and to limit the nature of the Federal authority over the project.

a) The first modification reduced the length of the proposed box culvert to 200 feet riverward of the levee. This modification sited the culvert above the OHWM, thereby negating the need for the applicant to obtain authorization under Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403). The modification also reduced potential impacts to the Federal revetment along the Missouri River and, possibly, to impacts riverward of the rectified channel line. The first modification also incorporated a wetland area of approximately 28 acres, located on the northeast portion of the site into the proposed retention basin, thereby eliminating the need to destroy the wetland.

b) The second modification included the proviso that the applicant purchase a 10-acre tract of land located between the Riverport-Howard Bend levee tie-back and the I-70 corridor riverward of the proposed levee. Additionally, the culvert proposal was modified again. In the new plan the culvert extended only minimally riverward of the levee and drained into a rock-lined stilling basin. The stilling basin would be constructed to permit discharges to flow laterally throughout the area between the levee and the Missouri River. Although approximately 1 acre of wetland would be destroyed by this modification by construction of the outfall channel and stilling basin the modification would promote the development, maintenance, and/or enhancement of additional or existing wetlands. The second modification is the current proposal and the subject of the following assessment.

b. **Need For the Activity.**

(1) Market studies completed by the applicant indicate a demand for a retail-commercial-industrial complex in the west county area of the kind proposed. The I-70/I-270 area has been identified as the primary remaining growth corridor in St. Louis County. Therefore, the applicant contended that Riverport would serve the need for a specific kind of development in a rapidly growing area of the county and be of economic benefit to the county and the metropolitan St. Louis area.

(2) The viability of the development project is directly related to the developer's ability to provide adequate flood protection. The proposed fill material constitutes a portion of a levee which is an integral component of the overall development.

c. **Economics.**

(1) It has been estimated by the applicant that construction of the project would stimulate the investment of $300-500 million dollars in a 10 to 12 year period and create approximately 8,200 permanent jobs.

(2) Conversion of farmland to the proposed development would provide positive tax benefits. It is anticipated that property tax values would increase significantly: sales tax revenues to the state and county would be generated as a result of sales and services; and Federal and state income tax revenues would be expected to increase with increasing numbers of employees. The magnitude of the tax revenue increase, number of jobs, and income generated would be highly dependent on whether the development results in the relocation of current county enterprises, the recruitment of non-regional businesses, or the relative proportion of these two factors.

(3) Concurrent with the development of commercial entities is the need for development of public services, such as roads and utilities. The St. Louis County Commission, pursuant to the rezoning of the proposed site (see paragraph 2.d.), is requiring the applicant to assume the expenses for the I-70 interchange improvements, the widening and extending of the Earth City Expressway, the selective signalization, and the construction of sewage lines and other infrastructural improvements. Public contributions for the maintenance of these improvements is not known.

(4) The applicant has provided KCD with several publications documenting the shortage of vacant industrial lands in St. Louis County. The *St. Louis County Economic Development Report* (1982) and *Update of the St. Louis County Vacant Industrial Land Inventory* (1982) indicated that the county has approximately 12,600 acres of vacant industrially-zoned land as of June, 1982, and an additional 840 acres of onsite expansion space. However, the reports noted that only 3,347 acres were rated as Class I, which represents land most suitable for industrial development. Class I lands were evaluated on the basis of highway access and routing, topography, flooding and drainage, and other known environmental problems. Half of the Class I lands were concentrated at Earth City and Spirit Airport, and only 7 percent of the Class I parcels were 25 acres or greater in size (see paragraph 2.x.).

d. **Land Use Classification.**

(1) The proposed development site was initially zoned by the St. Louis County Planning Commission as "FPNU" (Floodplain — Non-Urban); however, the applicant petitioned the St. Louis County Council to rezone the project site to FPC-8 and FPM-3 (planned commercial and retail, and planned industrial, respectively) to accommodate the project. On 25 June 1984, the St. Louis County Council formally approved the County Ordinances No. 11,584 and 11,585, which amended the St. Louis County Zoning Ordinance to permit the zoning modifications.

(2) The project, if constructed, would alter the current land use of the area which is agricultural production. It is anticipated that the following activities, either on their own or in combinations, will have cumulative effect on the Missouri River floodplain: past development (Earth City); attendant improvements in access and visibility planned by the applicant and the County Department of Traffic and Highways (extension of Earth City Expressway to the intersection of Olive Street and Hwy 141, and improvements on Creve Coeur Mill Road); improvements in wastewater treatment capacity planned by the Metropolitan Sewer District; state highway commission plans to construct a new Route 115 Missouri River crossing connecting Route 94 in St. Charles County and Interstate 270 in St. Louis County; revised plans by KCD to study the feasibility of constructing the L-15 levee; and other improvements in services and infrastructure will, no doubt, accelerate localized development within the Missouri River floodplain in St. Louis and St. Charles Counties.

e. **Flood Hazards.**

(1) The proposed development is located within the base (100-year) floodplain of the Missouri River. The proposed levee would provide the 500 acre site with protection against the 500 year flood.

(2) St. Louis County is a participant in the National Flood Insurance Program. As such, any development within the Regulatory Floodway that would have the cumulative effect of raising the 100-year flood stage on the Missouri River 1 vertical foot must comply with the regulations promulgated by the Federal Emergency Management Agency (FEMA). It has been determined by KCD, and with the concurrence of FEMA, that the location of the levee is landward of the Regulatory Floodway. Therefore, it is concluded that the proposed levee would not have a singular adverse impact on Missouri flooding.

(3) Based on an analysis of flood routing projections and hydrological modeling furnished by the applicant, KCD has determined that the location and alinement of the proposed levee would not occupy that portion of the floodplain that would reduce the conveyance available for the passage of high flows. Flood heights in Fee Fee Creek would not be increased by the levee. The organization of the interior drainage and provisions for increased flows through the Earth City Expressway should accommodate local drainage through the project area to the Missouri River more adequately than present facilities. KCD will recommend that the tie-back between Howard Bend and Riverport levees be constructed with at least a 24-inch-diameter drainage structure with a sluice gate to facilitate field drainage. There would be no other structures to drain the agricultural area behind the Howard Bend levee between Creve Coeur Creek and the Riverport levee.

(4) Pursuant to the St. Louis County Zoning ordinances, the applicant must provide a floodplain study to the County Department of Highways and Traffic prior to final approval of the Riverport development plan. It is county policy to adhere to FEMA guidelines and, in this particular instance, the development would not be allowed to increase flood stages for a 72-hour, 100-year flood event in any adjacent creek. If such an increase is demonstrated by the study, the applicant would be required by the county to redesign the project to comply with their guidelines.

(5) The discharge of fill material into the wetland was evaluated in accordance with the provisions of Executive Order 11988 (EO) on Floodplain Management, as implemented through Federal Regulation 33 CFR 320.4(k)(1). As previously noted the proposed development would be located landward of the FEMA-designated Regulatory Floodway. It is, however, located within the base (100-year) floodway fringe. Therefore, the discharge of fill into the wetland is subject to the provisions of the EO.

(6) The objective of the EO is the avoidance to the extent possible, allowed by law, of long and short term adverse impacts associated with the occupancy and modification of the floodplain and avoidance of direct and indirect floodplain development, wherever there is a practicable alternative. An analysis of alternatives has supported the applicant's contention that no practicable alternative site exists (see paragraph 2.x.). Impacts on the floodplain of the discharge of fill material in the wetlands have been assessed. The values associated with those wetlands, such as wildlife habitat, floodwater retention, groundwater recharge, water purification, etc. have been minimized by mitigation proposed by the applicant and required as conditions of permit issuance.

f. **Food Production.**

(1) Analysis of aerial photography and field investigations have confirmed that the site of the proposed development, except for timbered areas, has been in agricultural production for at least the past two decades. The soil within the development area is classified by the Soil Conservation Service (SCS) as a Blake-Eudora-Waldron association, which is primarily characterized as somewhat poorly drained and well drained, nearly level, deep, and formed in alluvial sediment. The soil types found at the site have been determined by SCS to meet the criteria for classification as "prime farmland," which is defined as " . . . the best land for producing food, feed, forage, fiber,

and oilseed crops. It has the soil quality, growing season, and moisture supply needed to economically produce a sustained high yield of crops. If it is properly treated and high level management and acceptable farming methods are used, prime farmland produces the highest yields with minimal inputs of energy and economic resources, and its use results in the least damage to the environment", (USDA 1982). Approximately 42,000 acres within St. Louis County meet the criteria for prime farmland. This acreage comprises about 12 percent of the acreage within the county, and nearly all of it is under cultivation. The proposed development would directly remove from production approximately 450 acres, or 1 percent of the available prime farmland in St. Louis County.

(2) The discharge of fill material would not have a significant singular impact on food production nor would the development as a whole. However, the cumulative effects of similar losses is probable as prime farmlands are converted to alternative uses. Two possibilities seem likely. First, marginal and less productive lands are converted to farm use to mitigate for losses in production. Marginal lands generally require more intensive and expensive management practices, such as clearing, irrigation, erosion control, slope protection, and fertilization. Because the proposed development area is not irrigated, water resources are generally used efficiently and effectively. Converting areas that may require irrigation into agricultural areas would be an adverse and irretrievable commitment of water and energy resources. Second, if marginal lands are not put into agricultural usage a net loss in production would occur.

(3) In accordance with the 11 August 1980 Council on Environmental Qaulity Memorandum concerning the analysis of impacts on prime agricultural lands, SCS was consulted about the proposed work. The SCS confirmed that the soil mapping units would be classified as prime farmland and wetland, and stated its general policy of discouraging the irreversible conversion of prime farm acreage if practicable alternatives exist.

(4) Section 4208 of the Farmland Protection Policy Act expresses the intent of Congress that the legislation not authorize the Federal government in any way to regulate the use of private or non-Federal land, or in any way affect the property rights of owners of such lands.

g. **Fish and Wildlife.**

(1) The development site encompasses several habitat types utilized by endemic and transitory fauna. These are: bottomland timber, agricultural fields, old field/shrub vegetation, isolated palustrine emergent wetlands, and stream and river channels. Additionally, the transition zones between habitat types afford even greater concentrations of habitat attributes through the creation of "edge".

(2) Separate onsite investigations performed by the applicant, KCD, and representatives of Federal and state agencies recorded the presence or field signs of the following species:

Amphibians/Reptiles.

Southern leopard frog (*Rana pipiens sphenocephala*)

Birds

American robin (*Turdus migratorius*)
Black-capped chickadee (*Parus atricapillus*)
Red-tailed hawk (*Buteo jamaicensis*)
Field sparrow (*Spizella pusilla*)
Mourning dove (*Zenaidura macroura*)
Indigo bunting (*Passerina cyanea*)
Blue jay (*Cyanocitta cristata*)
Gray catbird (*Dumetella carolinensis*)
Cardinal (*Richmondena cardinalis*)
Common bobwhite (*Colinus virginianus*)
Common crow (*Corvus brachyrhynchos*)
Bald eagle (*Haliaeetus leucocephalus*)
Woodpeckers, unidentified

Mammals

White-tailed deer (*Odocoileus virginianus*)
Eastern cottontail (*Sylvilagus floridanus*)
Eastern gray squirrel (*Sciurus carolinensis*)
Woodchuck (*Marmota monax*)
Raccoon (*Procyon lotor*)
Opossum (*Didelphis marsupialis*)
Striped skunk (*Mephitis mephitis*)
Fox (*Vulpes* sp. or *Urocyon* sp.)

Additionally, the applicant has compiled a listing of the vertebrate fauna likely to inhabit or utilize the proposed development site (see Appendix I). The Blake-Eudora-Waldron soil association, of which the site is classified, has 60 to 80 percent of total area in cropland and grassland, which provide openland habitat for wildlife. Rabbit and mourning dove populations in these areas are rated good to excellent, quail numbers poor, and pheasant populations small. This soil association also accounts for major wetland sites in the county which are the important waterfowl areas (USDA 1982).

(3) The principal soil types within the proposed site are Blake, Eudora, Booker, and Sarpy. Appendix II rates each soil type on its potential for various wildlife habitat elements.

(4) The primary impact of the development would be conversion of farmland, woodland, and brushland into an industrial/commercial complex. As of 1979, 26 percent of the county was in some form of woody vegetation, 8 percent was in grassland, 14 percent was cultivated, and 52 percent was urban (USDA 1979). Population records indicate a migration of population from the inner city into the surrounding county areas (MDNR, in USDA 1979). USDA (1979) notes that such a shift in population increases the pressure on the county's farm and forest land as these acreages are converted to urban developments and associated facilities. The indirect or sequential impacts to wildlife result from the concurrent loss of habitat

which, in turn, results in a reduction of population size and diversity of endemic and transitory species. Conversion also results in the colonization and exploitation of available habitat and resources by species adapted to human activities and encroachment. The largest habitat loss would be agricultural fields which provide food for resident and migratory wildlife. Scattered timber, shrub and perimeter wetland areas, which provide food, cover, roosting and nesting sites would be minimally affected. The impact of discharging fill material into a wetland would be ameliorated by incorporating approximately 28 acres of existing palustrine forested wetland into the planned retention basin; purchasing an additional 10 acres of currently agricultural land between the Riverport-Howard Bend levee tieback and I-70 for wetland development; and designing the outfall channel to allow drainage to flow in a normal manner to facilitate wetland habitat between the levee and the river.

h. **Endangered Species.**

(1) The U.S. Fish and Wildlife Service has indicated that the bald eagel (*Haliaeetus leucocephalus*), a Federally-listed endangered species, has been sighted in the riparian area riverward of the proposed location to be developed. There is currently no designated critical habitat within the project area, but the service has noted that the Missouri River provides wintering habitat for the eagle. Factors which determine suitability for such habitat include the presence of open water (food source -predominantly dead, dying, or otherwise vulnerable fish); suitable perches (large diameter tall trees with stout horizontal branches, preferably bordered by an open area); and, roosting sites (well protected from wind). The riparian timber along the Missouri River adjacent to the proposed site affords such habitat.

(2) The 1984 Missouri Mid-Winter Eagle Survey, which was conducted jointly by the Missouri Department of Conservation, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife

Service, recorded the largest concentration of bald eagles in the state along the Missouri River in St. Louis County (Missouri Department of Conservation 1984). The count for the area was 146 eagles, which included 85 mature eagles and 61 immature eagles. The second largest concentration of eagles (85) was recorded along the Mississippi River in St. Louis County. These data indicate that St. Louis County, particularly wooded areas contiguous to the major rivers, provides valuable habitat for bald eagles.

(3) The proposal would temporarily impact suitable habitat during some phases of the construction, but the enhancement of the wetland would provide additional habitat.

(4) The major long-term impact on bald eagles would be the human disturbance. Grier et al. (1982) have noted that the most important consideration concerning management of roosts is the prevention of human disturbances. Such disturbances may cause site abandonment. At feeding sites the availability of food is the primary management goal and human disturbance is of secondary importance. The authors recommended the prohibition of construction of roads, highways, buildings, etc. near roosts. Such a prohibition was not referenced concerning management of diurnal perches; however, it was recommended that prohibition of land uses that would destroy, or otherwise make unsuitabie, trees of other habitat features used as hunting or resting perches. Stalmaster (in Steenhof 1978) calculated that 98 percent of wintering bald eagles will tolerate human activities within 300 meters; however, only 50 percent of eagles tolerate human disturbances at 150 meters. Automobile traffic has been determined to be one of the least disturbing human activities (Steenhof 1978).

It is possible for the applicant to minimize disturbance to eagle activities along the riparian timber zone by scheduling construction of the drainage way during spring and summer periods when eagles are at northern areas; minimizing the destruction of

roosting or perching sites during construction; allowing an adequate distance between the timber zone and the construction site to buffer noise and visual impacts; siting the commercial and light industrial concerns nearest the levee in order to reduce traffic and human activity near the timber zone; and scheduling site development beginning at the southern end of the site to allow the maximum time possible before the areas nearest eagle habitation are disturbed. Even under the aforementioned conditions, the combination of I-70 traffic across the Missouri River and development within Riverport would most likely preclude roosting because of the high disturbance factor; however, with an adequate source of fish, the site could be maintained for diurnal perching activities.

i. **Water Qaulity.**

(1) The development would lead to short and long-term changes in water quality within the affected site. It is anticipated that turbidity and suspended solids will increase during construction phases; however, after roads are paved, and vegetation is established, it is likely that a net decrease in the turbidity and suspended solids from runoff will result because of settlement in the retention basin and reduced wind and water caused erosion due to the stabilization of previously exposed soils.

(2) It is anticipated that reductions in phosphates, nitrates, and ammonia will result because of the cessation of agricultural fertilization. It is also likely that reduced volumes of pesticides and herbicides will be transported from the site if the land use is altered.

(3) Industrial and domestic wastes generated by the proposed project would be disposed of in compliance with Federal and state standards.

(4) It is anticipated that operation of the project would result in increases in oils and greases and other traffic-generated

pollutants. However, it is not anticipated that construction and/or operation of the project would significantly impact local water quality.

j. **Air Quality.**

(1) The quality of air in the St. Louis area has been rated by the Environmental Protection Agency to be, at times, in excess of the National Ambient Air Quality Standards level. The project area is located within a non-attainment area for ozone concentrations. Although the types of industry proposed for the development are not expected to create any serious impacts on the quality of air, subsequent development within the industrial park and in adjacent areas would generate increased vehicular emmissions.

(2) Completion of Phase 2 of the associated development, for instance, would result in the addition of approximately 47,600 vehicles per day in the area. Completion of the entire development would add a total of 61,000 vehicles per day to the area (St. Louis County Department of Planning, 1983). The increase of 61,000 vehicles per day would increase vehicular emissions. Transportation vehicles are known to emit approximately 60 percent of the total annual air pollution tonnage (Owen, 1980). The number of additional cars in the area adjacent to the project would not only increase the amount of carbon monoxide (CO), but would also increase the quantities of unburnt hydrocarbons and nitrogen oxides. The increased combination of these three emissions results in the fastest known photochemical reaction in polluted air, which results in the formation of additional ozone.

k. **Wetlands.**

(1) An investigation of the entire development was conducted from 12 to 14 December 1983. A copy of the wetland determination is attached to this assessment as Appendix III. The conclusion reached in the determination was that the construc-

tion of an approximately 800-foot-long portion of a levee and the construction of the originally proposed outfall structure would necessitate the placement of fill material in wetland areas, and that the discharge of fill in these areas would require Department of the Army authorization.

(2) The proposal includes the placement of fill in a wetland for construction of the levee. The direct placement of the fill would destroy a minimum of approximately 3 acres. The levee would indirectly affect some of the drainage patterns of the area which provide a source of water to the wetland.

(3) The modified proposal includes the relocation of the retention basin to include the palustrine forested wetland (shown as transect T10 in the wetland determination). The predominant tree species found in this area and the approximate percentage of the growing season that they can tolerate flooding and remain healthy are as follows (also see Appendix IV).

NAME	APPROXIMATE PERCENT OF GROWING SEASON SPECIES CAN TOLERATE INUNDATION
Black willow (*Salix nigra*)	43
Silver Maple (*Acer saccharinum*)	38
Eastern cottonwood (*Populus deltoides*)	35
Boxelder (*Acer Negundo*)	29
Red mulberry (*Morus rubra*)	26
Eastern Sycamore (*Plantanus occidentalis*)	25
Dogwood (*Cornus* sp.)	less than 2

The data in the chart above are based on mortality rates for mature trees. Saplings and seedlings tolerate considerably less inundation. This was demonstrated in the project area where the species of healthy seedlings and saplings found were those that, when mature, tolerate inundation at least 29 percent of the growing season. Saplings of red mulberry, for instance, which

can tolerate inundation up to 26 percent of the growing season, when mature, were either dead or showed signs of stress. Changes in the drainage patterns by redirecting water into this area could have some effect on community composition (survival of more water tolerant species). Additional standing water in the area may stress mature trees depending on the time of year and duration. As flooding in the Missouri River basin usually occurs during the growing season, this would mean that the majority of water from runoff and flooding would be drained into the wetland during the growing season. Such an action would adversely affect the existing tree population if the inundation is prolonged.

(4) Construction of the outfall channel and stilling basin would additionally destroy approximately 1 acre of wetlands. This modification, as explained below, would enhance existing wetlands and create additional wetland areas, which would mitigate for this loss.

(5) The applicant has also modified the initial proposal to include the acquisition of 10 acres of land situated between the Riverport-Howard Bend levee tie-back and the I-70 bridge. The applicant would utilize this area as a stilling basin for discharges from the retention basin. This method will permit discharges to flow overland prior to entry into the Missouri River.

(6) Research concerning quantifiable functions of forested wetlands is limited. It is known that the amount of detritus produced by riparian wetlands is substantial and results in increased food chain productivity. Forested wetlands also have increased capacities for water storage which can reduce the impacts of flooding. The precise benefits of the wetlands in the project area cannot be quantified. The area is valuable for wildlife as shown by the diversity of the species that inhabit the site. The presence of agricultural land adjacent to the wetlands in the project area increases the value of the wetlands by providing additional trophic sources for some species. Both the encroach-

ment of man through subsequent development outside and within the confines of the levee, as well as, the loss of farmland would reduce the value of the wetlands for wildlife.

l. **Recreation.**

(1) Recreation areas located within the immediate area of the proposed project are the Bangert Island State Wildlife Area and Creve Coeur Lake.

(2) Bangert Island, located directly across the Missouri River from the proposed site, is open for hunting, fishing, and other wildlife pursuits. Use is very limited because the site has no public access in the vicinity. The Missouri Department of Conservation has constructed a boat launching ramp approximately 2.6 miles downstream on the left bank of the Missouri River. The department anticipates a substantial increase in recreational activity on the island as a result of the construction of this ramp. However, the Riverport project is not likely to impose any adverse impacts on the island.

(3) Creve Coeur Lake, which is managed by the St. Louis County Department of Parks and Recreation, is located approximately 2.5 miles south of the proposed development site.

(4) Impacts of the proposed development on these sites would be the temporary impairment of air quality, water quality, noise levels, and esthetic considerations during construction. Cumulative impacts may be expected to create more substantive impacts primarily related to the urban encroachment into rural and natural areas.

m. **Wild and Scenic Rivers.**

(1) The proposed project has been reviewed in accordance with the Wild and Scenic Rivers Act (16 USC 1271-1287). The Missouri River between approximately river miles 29.6 and 29.9 has not been listed, and is not eligible for listing under the criteria of the act as either a wild or a scenic river. The proposed

work would not have any effect on any component of the national wild and scenic river system.

n. **Public Health.**

The proposed development has not been designed for heavy industry and would not be expected to significantly affect public health from industrial related pollution. Increases in air pollution in the form of carbon monoxide, unburnt hydrocarbons, and nitrogen oxides from increase in vehicular emissions from increases in traffic, may increase pollution-related illnesses, particularly since the development area has already been determined to be within a non-attainment area for ozone (Owen 1980).

o. **Navigation.**

It has been determined that neither the original proposal nor the subsequent modifications would include any structure extending to or riverward of the rectified channel line and, therefore, no impact on navigation is anticipated.

p. **Public Safety.**

Traffic generated from the development within the project area would increase potential risks of traffic accidents. The St. Louis County Department of Highways and Traffic has required that as a condition for rezoning of the area, the applicant improve Earth City Expressway and Prichard Farm Road, provide signalization at appropriate intersections, and improve the I-70 interchange. These measures should improve public safety over the existing conditions.

q. **Cultural Resources.**

The National Register of Historic Places and supplements thereto have been reviewed. There is no indication that the proposed work would affect any cultural, historical, or archeological point of interest listed in or eligible for listing in the register. A stern-wheel vessel, the *Tyler*, sank just upstream

from St. Charles, Missouri sometime between 1878 and 1879 from an unknown cause. The exact location of the vessel is unknown. The proposed work, however, should not have an effect on the vessel because no work would be performed in the riverbed. (see Appendix V).

r. **Erosion.**

Temporary increases in erosion are anticipated during project construction as earthmoving operations proceed. However, long-term erosion is likely to be diminished as the site is paved and not subjected to wind and water erosion.

s. **Geological Resources.**

Neither the original proposal nor the modified proposal would have a significant effect on geological resources.

t. **Energy Needs and Conservation.**

Secondary development that would probably result from the proposed development would increase demands on energy consumption in the form of electricity, natural gas, coal, and petroleum products.

u. **Vegetation.**

The existing vegetation within the development area would primarily fall into two classifications: (1) crops and (2) wetland vegetation. The effect on agricultural productivity has been addressed under the heading of food production, and wetland vegetation has been addressed under the heading of wetlands.

v. **Water Supply.**

The water intakes for the city of St. Charles are located at approximately Missouri River mile 29.1, or 0.6 miles from the downstream limits of the project. The intakes for the water supply for the city of St. Louis are located at river mile 20.5. The proposed development would not impact the water supplies of either community.

w. **Esthetics.**

(1) The proposed conversion of agricultural fields to industrial and commercial development would result in esthetic impacts to the local area. It is anticipated that negative impacts on noise levels and air quality could result. Increases in population density and traffic are anticipated. Further, it is likely that visual aspects of the present site would be impaired.

(2) The esthetic impacts would be partially ameliorated by the maintenance of natural wetland areas and the inclusion of artificial waterways. Also, the maintenance of the riparian timber and wetland development along the Missouri River will reduce visual impacts from the opposite bank.

x. **Alternatives.**

(1) Alternatives Analyzed by the Applicant (See Appendix VI).

(a) The applicant's review of alternatives has taken into consideration factors they delimited as requisite needs to maximize the probability of a successful development. These included: (1) a minimum of 450 contiguous acres, which was based on the historical absorption rate for vacant rail served industrially-zoned land in St. Louis County and provide the desirable mix of industrial, retail, and commercial properties; (2) rail service for the industrial segment; (3) interstate accessibility and visibility for retail and commercial components; (4) accessibility to utilities; and (5) proximity to areas of high income and rapid population and income growth. Based on these parameters, the applicant examined properties in both St. Louis and St. Charles Counties.

(b) In light of the above criteria, the applicant evaluated seven sites within St. Louis County. These included:

1) Columbia Bottoms, which like Riverport, is located within the floodplain. However, the site is inaccessible to rail service

and is not in close proximity to interstate access or population growth corridors.

2) The Bellefontaine Road site was found to provide 456 acres of non-floodplain land and to be accessible to rail service. The disadvantages of this site are that it is located 4 miles from the nearest interstate highway and that it is removed from the West County-St. Charles growth corridor.

3) The Earth City site was determined to have 519 acres of available vacant, industrially-zoned land. Disadvantages were its inaccessibility to rail service and a need to reconstruct several miles of existing I-70 roadway to provide 500-year flood protection.

4) The Spirit West site comprised enough acreage to accommodate the proposed development, however, the available acreage is not contiguous and only 72 acres have direct interstate access. Further, the Southern Pacific Railroad spur would require reconstruction and the maximum flood protection afforded by the site was determined to be 100-year.

5) The North Bridgeton, near the city of Bridgeton, did not offer the 450 contiguous acres the applicant desired. Other drawbacks to this location were the lack of access to either I-70 or I-270, which were 2 to 3 miles from the site; and the topography of the area, which would limit rail access to only a portion of the site.

6) The I-55/McKenzie site, which is located in the southern part of St. Louis County, had approximately 400 acres of vacant land. This was slightly less than the 450 acres required, and of this 400 acres, only 120 acres were contiguous. The site also lacked visibility from and close access to the interstate. Population growth and income in this area are relatively static. Therefore, the combination of the lack of contiguous acreage, limited interstate access and visibility, and static growth eliminated this site for a viable project.

7) The Riverport site provided 450 acres, access and visibility to I-70, access to rail traffic at feasible costs, flood protection at feasible costs, accessibility to utilities, and proximity to the West County growth corridor.

(c) An analysis of St. Charles County by the applicant found that only one interstate (I-70) and three railroads (Norfolk Southern; Burlington Northern; and Missouri, Kansas, Texas) accessed the county. The applicant evaluated four sites within St. Charles County (see Appendix IV), which included:

1) The Arrowhead Industrial Park is located ¼ mile from the interchange of I-70 and Missouri Route 79 and is bisected by the Norfolk Southern Railroad. The disadvantages of this site were the shortages of available land, as only approximately 350 acres are available, the distance of the site from high income and population growth areas, and insufficient visibility from I-70.

2) The Cave Springs site is located 3 miles east of the Arrowhead development in a commercially developed area on the western edge of the City of St. Charles. This site met the requirement of visibility and accessibility to I-70, and high growth and income demographics. However, the site offered only 250 acres and was ½ mile south of the Norfolk Southern Railroad. Therefore, the site lacked adequate size and railroad access.

3) The Wentzville site is an industrial area in the vicinity of the General Motors Plant. It has ample size and rail access but no visibility from I-70 and is remote from high income and population centers in St. Charles County.

4) The Elm Point Industrial Park north of St. Charles also was found to have adequate size and rail access; however, this site was rejected on the basis of its remote location and lack of visibility and access to I-70.

(d) In addition to examining alternative siting proposals, the applicant also analyzed several onsite alternatives that would

achieve the objective of flood control and further minimize the impact of the discharges of fill material in wetland areas.

1) The first onsite alternative analyzed the construction of a concrete flood wall parallel to I-70. The wall would be constructed around the wetland and, thus, out of Corps jurisdiction. The applicant rejected this proposal on the basis of prohibitive costs involved in constructing a concrete wall of such major dimensions.

2) The second alternative proposed by the applicant was to fill in the entire project site to raise its elevation to 464 feet, NGVD, which would provide 500-year flood protection without the need for levees. Such a proposal would not mitigate for any wetland losses and would require the filling of additional wetlands. This proposal was rejected on the basis of environmental concerns and prohibitive costs of earthmoving operations and materials.

3) The third alternative proposed not constructing the levee, which would leave the commercial development vulnerable to any flooding greater than the 100-year event. Development of the area would result in additional social and economic benefits over the status quo through the creation of new jobs, materials for new construction, additional tax revenue, and additional revenue being spent within the county for goods and services.

(2) Kansas City District has reviewed the assessment of alternatives provided by the applicant. The District was concerned about the adequacy of the applicant's assessment involving several factors. Of primary concern were the site parameters required by the applicant. It was clear that the need for interstate highway and rail access are of primary importance for project success in attracting tenants, buyers, and customers. It was also evident that if the project were sited in the floodplain adequate flood protection would be necessary to satisfy potential buyers. KCD also acknowledged the logic in siting the development in areas with attractive demographic composites, i.e., high growth

and income levels. KCD, however, questioned the acreage requirement imposed by the applicant. There was also a noted absence of the assessment of unzoned lands and an assessment of the potential for redeveloping existing properties. The applicant submitted additional information concerning the reasons for chosing their evaluation parameters. Their reasons appeared valid. However, KCD requested additional information from St. Louis County concerning the availability of land zoned for other than commercial or industrial uses. From their response KCD has determined that there are no practicable alternatives to the Riverport location in St. Louis County. St. Charles County was also evaluated. However, because of topography, lack of interstate access and visibility, and location of growth corridors in relation to available rail lines, there are no sites in this county that would meet all of the parameters. Therefore, there are no practicable alternatives that would achieve the purposes of the project.

3. FINDING OF NO SIGNIFICANT IMPACT. I have evaluated the anticipated economic, social, and environmental effects of the proposed Riverport levee and outfall structure. It is my determination that the granting of a Department of the Army permit will not have a significant effect on the quality of the human environment; therefore, the filing of an environmental impact statement is not required.

/s/ Robert M. Amrine
Colonel Corps of Engineers
Commanding

29 April 85

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1382

Missouri Coalition for the Environment, a corporation; League of Women Voters of St. Louis County, a corporation; League of Women Voters of St. Louis, a corporation; The Open Space Council for the St. Louis Region, a corporation; Lee Streett; Martin E. Gardner, Jr.; Cornelius Alwood; Donald F. Weiler; Stanley J. Adams; and Beverly Toner,

Appellants,

v.

Corps of Engineers of the United States Army; John O. Marsh, Jr., Secretary of the Army; Robert K. Dawson, Assistant Secretary of the Army for Civil Works; Lt. Gen. E.R. Heiberg, III, Chief of Engineers; Col. John H. Atkinson, III, District Engineer of the Kansas City District, Corps of Engineers; Sverdrup Corporation, a corporation; Riverport, Inc., a corporation; and Riverport Associates, a limited partnership,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

JUDGMENT

(Filed: March 24, 1989)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

January 27, 1989

Non-federal appellees will recover from the appellants the sum of $128.60.

A true copy.

ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

Mandate issued 3/24/89

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1382-EM

Missouri Coalition for the Environment, etc., et al.,
Appellants,

v.

Corps of Engineers of the U.S. Army, Sverdrup Corporation, etc., et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

March 17, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
AUG 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-2044

In the Supreme Court of the United States

OCTOBER TERM, 1989

MISSOURI COALITION FOR THE ENVIRONMENT, ET AL., PETITIONERS

v.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Army Corps of Engineers acted arbitrarily or capriciously by not preparing an Environmental Impact Statement in connection with its decision not to revoke a permit authorizing the filling of wetlands in St. Louis County, Missouri.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 866 F.2d 1025. The opinion of the district court (Pet. App. 18a-45a) is reported at 678 F. Supp. 790.

JURISDICTION

The opinion of the court of appeals was filed on January 27, 1989. A petition for rehearing was denied on March 17, 1989 (Pet. App. 82a). The petition for a writ of certiorari was filed on June 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1344 (1982 and Supp. V 1987), authorizes the Corps of Engineers to issue permits for the discharge of dredged or fill material into the wetlands and the navigable waters of the United States. The Corps' regulations for evaluating permit applications are published at 33 C.F.R. 320.4. Those regulations require the Corps to assess "the public interest" by balancing favorable effects against any detrimental effects. 33 C.F.R. 320.4(a). Such a "public interest review" (*ibid.*) takes into consideration a number of factors, including environmental concerns and flood hazards. The Corps also has regulations concerning the modification, suspension, or revocation of Section 404 permits. See 33 C.F.R. 325.7. Those regulations authorize the Corps' district engineer to conduct informal proceedings (Pet. App. 26a) concerning whether an existing permit should be modified, suspended, or revoked.

2. In 1983, respondent Riverport Associates filed an application with the Corps for a permit to discharge fill material into a wetland to construct a levee on the bank of the Missouri River in St. Louis County, Missouri.[1] The levee was intended to provide flood protection for a tract of approximately 500 acres. Riverport Associates proposed to construct a retail, industrial, and commercial development – known as Riverport – on about 370 of those acres. Pet. App. 22a, 56a. Riverport Associates, after consultation with the Corps, submitted a proposal that would adversely affect four acres of wetlands. *Id.* at 57a-58a, 70a-71a. Riverside Associates also agreed that it would purchase a ten-acre parcel outside of the levee to create higher quality wetlands. *Id.* at 25a-26a.

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[1] The plan called for 800 feet of the levee to be made by the placement of fill upon wetlands. Pet. App. 57a.

In April 1985, the Corps published an Environmental Assessment (EA) concerning the permit application.[2] Pet. App. 56a-79a. An EA is used by the Corps in determining whether an Environmental Impact Statement (EIS) must be prepared under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). Here, the EA considered, among other things, the following factors: (1) need for the proposed activity, (2) land-use classification, (3) flood hazards, (4) food production, (5) fish and wildlife, (6) endangered species, (7) water quality, (8) air quality, (9) wetlands, (10) recreation, (11) implications of the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, (12) public health and safety, (13) navigation, (14) cultural resources, (15) erosion, (16) geological resources, (17) energy needs and conservation, (18) vegetation, (19) water supply, and (20) esthetics. The Corps concluded that its issuance of a Section 404 permit would "not have a significant effect on the quality of the human environment" and, therefore, that "the filing of an environmental impact statement [was] not required." Pet. App. 79a. The Corps then issued the Section 404 permit to allow construction of the levee. Pet. App. 25a.

3. Several months after the Corps issued the Section 404 permit, St. Louis County announced plans to construct a domed sports stadium in Riverport; the County hoped to secure the St. Louis professional football team as the primary tenant. Pet. App. 4a-6a, 26a. The County purchased 100 acres within Riverport in December 1985.[3]

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[2] An "Environmental Assessment" is defined by regulations issued by the Council on Environmental Quality as a concise public document prepared by a federal agency to provide "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. 1508.9(a)(1).

[3] The County also planned to use about 150 acres for additional stadium parking. Pet. App. 27a.

Id. at 26a. The Corps then began an informal process to consider whether, in light of the stadium proposal, it should modify, suspend, or revoke the Section 404 permit. Pet. App. 49a. During that process, the County informed the Corps that no additional wetlands areas would be filled as a result of the stadium proposal. *Id.* at 27a, 30a.

Many of the present petitioners then filed an action raising issues concerning the Corps' issuance of the Section 404 permit and the later proposal regarding the domed stadium. *Missouri Coalition for the Environment* v. *Corps of Engineers,* No. 86-2229-C(2) (E.D. Mo. filed June 25, 1986). Because the Corps had not decided whether to modify or revoke the Section 404 permit in light of the stadium proposal, however, the district court dismissed without prejudice that portion of the complaint concerning the stadium. Pet. App. 27a-28a. The balance of the action, which challenged the legality of the Corps' decision to issue the permit in the first place, was dismissed with prejudice as part of a settlement agreement.[4] *Id.* at 28a.

On June 22, 1987, following lengthy proceedings, the Corps issued a Memorandum For Record (MFR) that summarized the agency's reevaluation decision. Pet. App. 48a-55a. First, the Corps concluded that a new permit application was not required because "there will be no placement of fill in wetlands resulting from the construction of the revised project" (*id.* at 50a), and the substitution of the stadium for commercial, retail, and industrial uses within Riverport would not lead to a significant increase in the scope of the activities authorized by the existing permit. Second, the Corps stated that the environmental effects of the stadium proposal "would result in potentially signifi-

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[4] In connection with the settlement, Riverside Associates agreed to create 13 acres of new wetlands. In addition, the non-federal respondents paid $100,000 to the plaintiffs. Pet. App. 28a.

cant changes in only two of the twenty-eight environmental impacts addressed in the EA," namely economics and recreation. *Id.* at 51a. With regard to those two factors, the Corps found that the adverse effects "that are felt in some locations are mitigated to some extent by the beneficial economic and recreation impacts occurring in other locations." *Ibid.* The MFR also discussed: (a) alternative sites for the project, (b) highway access, (c) air quality, and (d) cumulative effects. *Id.* at 51a-55a. The Corps concluded that "the change of environmental impacts due to the revised project does not warrant modification, suspension or revocation of the Riverport permit." *Id.* at 51a. Accordingly, the Corps abided by its original decision not to prepare an EIS in connection with its issuance of the Section 404 permit.

4. Petitioners then filed this action in the district court alleging, among other things, that Section 102(2)(C) of NEPA required the Corps to prepare an EIS with respect to its reevaluation decision concerning the stadium proposal. Pet. App. 18a-19a. The district court, after hearing evidence explaining aspects of the Corps' decision, ruled: "Upon review of the reevaluation record and other relevant information here, it is not possible to find [that] the Corps acted in an arbitrary, capricious, or unreasonable manner in reaching its reevaluation decision." *Id.* at 35a. In the alternative, the district court, relying upon this Court's decision in *Heckler* v. *Chaney,* 470 U.S. 821 (1985), held that the Corps' decisions not to require a new permit application and not to modify, suspend, or revoke the original permit were not subject to judicial review. Pet. App. 38a.

5. The court of appeals affirmed. Pet. App. 1a-17a. The court ruled that the case was not rendered moot by the move of the St. Louis Cardinals professional football team to Phoenix, Arizona, because the County was con-

tinuing to try to interest a National Football League franchise to locate at the Riverport site. *Id.* at 6a-8a. The court then held that it could base its review of petitioners' claims upon the entire administrative record before the Corps, not just the MFR. *Id.* at 9a.

The court of appeals held that the Corps was not required to prepare an EIS. The court stated that petitioners had failed to carry their burden of demonstrating "that there were facts omitted from the administrative record which, if true, would show that the permitted project could have a substantial impact on the environment." Pet. App. 12a-13a. Alternatively, the court of appeals "agree[d] with the district court that a decision not to modify, suspend or revoke a Section 404 permit is one committed to the Corps' absolute discretion and, as such, it is not reviewable under the Administrative Procedures Act, 5 U.S.C. § 701(a)(1) [and] (2)." Pet. App. 12a n.10.

Judge Fagg dissented. He believed that the case was moot because the St. Louis Cardinal football team had moved to Phoenix and there was no indication that any other prospective "anchor tenant" was interested in the Riverport site. Pet. App. 16a-17a.

ARGUMENT

The court of appeals properly upheld the Corps' decision, and this case raises no dispositive issue of general importance. Thus, no further review is warranted.

1. The standard of review governing this case is now settled. Under the Administrative Procedure Act, 5 U.S.C. 706(2)(A), a reviewing court may not set aside an agency's decision to forgo preparation of an EIS unless the agency action is "arbitrary [or] capricious." *Marsh* v. *Oregon Natural Resources Council,* 109 S. Ct. 1851, 1860 (1989). See also *Wisconsin* v. *Weinberger,* 745 F.2d 412,

418 (7th Cir. 1984); *Webb* v. *Gorsuch*, 699 F.2d 157, 159 (4th Cir. 1983). In applying the "arbitrary or capricious" standard, a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). The court must give appropriate deference to matters within an agency's expertise. See *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983). And "[a]bsent a showing of arbitrary action, [courts] must assume that the agencies have exercised this discretion appropriately." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976).

Under the "arbitrary or capricious" standard, the courts have a particularly circumscribed role in reviewing an agency's decision not to alter its original analysis under NEPA in light of new information. As the Seventh Circuit observed in *Wisconsin* v. *Weinberger*, 745 F.2d at 418 (emphasis in original):

> an agency cannot have acted arbitrarily or capriciously in deciding not to file a [supplemental EIS] unless the new information provides a *seriously* different picture of the environmental landscape such that another hard look is necessary.

See also *Marsh*, 109 S. Ct. at 1865 (Court upheld action where "Corps conducted a reasoned evaluation of the relevant [new] information").

2. In this case, the Corps did not act arbitrarily or capriciously in deciding that St. Louis County's proposal to build a stadium on Riverport did not require the Corps to withdraw the Section 404 permit and prepare an EIS. The record shows (Pet. App. 14a), and petitioners do not dispute, that the Corps considered all of petitioners' complaints about the environmental effects of the proposed

stadium. The Corps requested a great deal of information from St. Louis County. *Id.* at 29a. The Corps received comments from every federal, state, and local agency with any interest in Riverport. *Id.* at 4a. And the Corps reviewed detailed submissions from petitioners, including 22 depositions and thousands of documents. *Id.* at 29a. The Corps' decision-making process took more than 16 months, and generated a 66-pound administrative record. *Ibid.* Indeed, the Corps conducted the most comprehensive reevaluation in the Corps' Kansas City District in the last ten years. *Id.* at 4a.

The Corps carefully considered every possible relevant factor. For example, the Corps asked the Missouri Highway and Traffic Commission to review the parking situation; the Commission found that the proposed plan was adequate. Pet. App. 32a. The Corps consulted with the Environmental Protection Agency regarding air pollution from stadium traffic; that agency informed the Corps that the proposal would not violate federal laws or regulations. *Id.* at 33a. And the Corps was careful in ensuring that drainage from the parking lots would not adversely affect any wetlands. Gov't C.A. Br. 34-35.

The Corps summarized its conclusions in the MFR. The Corps referred to the EA, which petitioners agree (see Pet. App. 10a) validly considered the environmental effects of the original Riverport proposal. The Corps stated: "The revised project would result in potentially significant changes in only two of the twenty-eight environmental impacts addressed in the EA. Those impacts are economics and recreation." *Id.* at 51a. The Corps then found that "[t]he adverse economic and recreation impacts that are felt in some locations are mitigated to some extent by beneficial economic and recreation[al] impacts occurring in other locations." *Ibid.* Accordingly, the Corps adhered to its finding in the EA that the Section 404 permit "will

not have a significant effect on the quality of the human environment." Pet. App. 79a. Petitioners do not explain how the district court erred in concluding that "it is not possible to find [that] the Corps acted in an arbitrary, capricious, or unreasonable manner in reaching its re-evaluation decision." *Id.* at 35a.

3. Petitioners argue (Pet. 7-18) that the court of appeals erred in not requiring the Corps to give a reasoned explanation for its decision. We do not read the court's opinion as expressing that view. Rather, it appears that the court of appeals understood petitioners' claim to be that the Corps failed to consider relevant environmental factors. Accordingly, the court reviewed the record before the Corps and found that it had considered every significant factor. See Pet. App. 14a. Contrary to petitioners' suggestion (Pet. 7), the court never ruled that an agency need not express the reasons why it concluded not to prepare an EIS.[5]

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[5] The other Eighth Circuit cases that petitioners cite (Pet. 18) also do not hold that an agency need not explain its decision not to prepare an EIS. In those cases, the plaintiff was contending that an agency had neglected to consider some particular aspect of the project at issue. For example, in *Winnebago Tribe* v. *Ray*, 621 F.2d 269, 271, cert. denied, 449 U.S. 836 (1980), which involved a permit for a power line over navigable waters, the plaintiff asserted that the agency's consideration ignored those portions of the power line that did not cross navigable waters. Similarly, in *Olmsted Citizens for a Better Community* v. *United States*, 793 F.2d 201 (1986), the plaintiffs alleged that the agency had failed to consider the socioeconomic impacts of a proposed prison hospital. And in *Ringsred* v. *City of Duluth*, 828 F.2d 1305, 1307 (1987), the plaintiff asserted that "the Environmental Assessment was deficient in that it failed to consider the environmental impact of and alternatives to the proposed parking ramp construction." Accordingly, the court of appeals in those cases merely responded to the claims raised by the plaintiffs.

Nor can there be any doubt that the Corps adequately explained the rationale for its decision. As we noted above, the Corps prepared an EA regarding the original permit application when the applicant proposed to develop the Riverport tract for nonspecific retail, commercial, and industrial purposes. Petitioners have conceded the validity of the Corps' original findings and conclusions in the EA. And when the Corps reevaluated its permit decision, it relied on many aspects of the original EA,[6] as well as its conclusions summarized in the MFR. Petitioners have not explained why any further explanation was required for a reviewing court to understand the Corps' reasoning.

Moreover, in light of the Court's recent decision in *Marsh* v. *Oregon Natural Resources Council, supra,* there plainly is no reason to grant review of the question that petitioners present. The Court in *Marsh* decided the proper standard for reviewing an agency's decision not to issue an EIS—*i.e.,* whether that decision was arbitrary or capricious.[7] And that standard implies that the agency must give a reason for its decision so that the reviewing court may decide whether the decision was arbitrary. See *Marsh,* 109 S. Ct. at 1861; *Vermont Yankee Nuclear*

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[6] The proposed stadium in Riverport did not call for the filling of any additional wetlands. Thus, most of the Corps' analysis in the original EA remained applicable to its consideration of the stadium proposal. For example, the Corps stated in the EA that the development of the Riverport tract would take certain agricultural lands out of production. Pet. App. 62a-64a. That would remain true whether or not the Riverport lands were devoted to a stadium or any other development.

[7] Before *Marsh,* the Eighth Circuit used the "reasonableness" standard for reviewing an agency determination that no EIS was required. See *Monarch Chemical Works, Inc.* v. *Thone,* 604 F.2d 1083, 1087 (1979).

Power Corp. v. *NRDC*, 435 U.S. 519, 549 (1978). Thus, there is now no doubt in the Eighth Circuit or anywhere else that an agency must explain its decision so that the reviewing court may find that the agency based its decision "on a reasoned evaluation 'of the relevant factors.' " 109 S. Ct. at 1861. This case therefore presents no issue warranting further review.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] In any event, petitioners do not challenge the alternative holding of the court of appeals—*i.e.*, that the Corps' decision not to suspend, modify, or revoke the permit was not subject to judicial review. Pet. App. 12a n.10.

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No. 88-2044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MISSOURI COALITION FOR THE ENVIRONMENT, *et al.*,
Petitioners,

vs.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, *et al.*,
Respondents.

PETITIONERS' REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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The brief in opposition appears calculated to obfuscate the Questions Presented, rather than disclose "any matter or ground why the cause should not be reviewed by this Court." Rule 22 of the Rules of this Court. The effort commences at page (I), where respondents mis-state the Questions Presented. The Questions Presented are to be stated by the petitioners. Rule 21. Respondents have no authority to replace them with a question they prefer. Petitioners have presented two Questions, of general importance, independent of the detailed facts of the administra-

tive record: whether the court of appeals erred in (1) upholding an agency Finding of No Significant Impact unsupported by a reasoned explanation or evaluation of relevant factors, and (2) barring plaintiffs' challenge to a Finding of No Significant Impact because the plaintiffs failed (in the court's view) to prove facts "omitted from the administrative record." These are fundamental questions that go to the availability and procedure of judicial review, not to whether the Corps "acted arbitrarily or capriciously" on the basis of thousands of documents and 66 pounds.

The effort continues at page 7, where respondents incorrectly assert "petitioners do not dispute . . . that the Corps considered all of petitioners' complaints . . ." Of course, petitioners have disputed that from the beginning, and have pointed out that it is not necessary even to look at the thousands of documents collected by the Corps to determine whether specified environmental impacts were considered, because there are no findings of those impacts, and there is no reasoned explanation of any findings. See, *e.g.*, Petition p. 21. Indeed, the Corps' decisional document (MFR) explicitly recites that the Corps will not even attempt to quantify, much less evaluate, air pollution impacts, since "agencies with responsibility for and special expertise in air quality matters do not regulate indirect sources of air pollution . . ." Pet. App. 53a-54a. The Corps could not and did not consider the traffic hazards and obstruction in the nearby communities of Maryland Heights and Bridgeton, described as "disaster" by the only expert who expressed an opinion on the subject, because the Corps refused to require any quantification of those impacts. See Petition, p. 21. The Corps could not and did not consider the effect of surface water run-off into the wetlands, notwithstanding the concerns of the Fish and Wildlife Service, because the Corps did not know what, if anything, would be done to protect the wetlands. See Petition, p. 21. The Corps refused to consider the cumulative impact of this revised project and other existing and planned projects to complete St. Louis County's Plan to

develop the entire 22,000-acre Missouri Bottoms. See Petition, p. 21. However, these failures of the Corps are significant here because they illustrate the inadequacy of the standard of review utilized by the court of appeals. To misrepresent petitioners' position on these details, and attempt to provoke debate over what the Corps "considered," simply diverts attention from the question whether the court of appeals followed the proper standards and procedure for judicial review.[1]

At page 8 respondents argue that the Corps "carefully considered . . . consulted . . . was careful . . .", citing only irrelevant pages of the government brief below for authority for that "care." This effort to provoke debate over the details of the administrative record is irrelevant to the Questions Presented. The error of these statements would become apparent if we had a reasoned evaluation of the environmental impacts, and searched for evidence to support it, but we have none.

Respondents pursue their diversionary course by asserting (p. 9) "Petitioners do not explain how the district court erred . . ." The judgment which this Court is asked to review is the judgment of the court of appeals, not the district court. The Petition fully explains two fundamental errors of the court of appeals. It happens that the district court erred in these same two respects, as well as others, but that is not what this Petition addresses.

At page 11, note 8, and on page 5, respondents describe as an "alternative holding" the ruling of the court of appeals that a decision not to modify, suspend or revoke a Section 404 permit in the public interest, pursuant to 33 C.F.R. § 325.7, is not reviewable under the Administrative Procedure Act. This is not an alternative holding on the question

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[1] The brief in opposition is replete with mis-statements of fact. Because most of them have no direct relevance to the Questions Presented, correcting them would further divert attention from the question at hand.

whether the Corps complied with NEPA,[2] and is not relevant to the Questions Presented. Of course, petitioners dispute this holding, but have not chosen to present that question on this petition for certiorari.

Mindful of Rule 17, petitioners have presented two questions of broad, general applicability to judicial review of determinations of no significant impact. The question of the reviewability of the public interest determination made pursuant to that obscure Corps regulation lacks the broad, general importance of the two Questions Presented by petitioners.

1. The first Question Presented is whether a federal agency must articulate a "reasoned evaluation" of the factors relevant to its determination that its action will result in no significant environmental impact. The brief in opposition concedes (pp. 7, 10, 11) that indeed the agency must articulate such a reasoned evaluation. By way of opposition, respondents claim that the court of appeals did not rule to the contrary (p. 9), and also that the Corps furnished such an evaluation (pp. 8-9). Both claims are disingenuous.

One of the two principal bases of the decision below is the court's explicit ruling that the agency need not furnish a reasoned explanation of its Finding of No Significant Impact:

> The Coalition argues that . . . , because the MFR does not convey a "convincing statement of reasons

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[2] The complaint advanced a number of claims. Pet. App. 5a. Among them was the claim that the Corps failed to comply with NEPA and the NEPA-implementing regulations in making its Finding of No Significant Impact, a claim which underlies the Questions Presented here. Both courts below held this claim reviewable, and reviewed it. In addition, petitioners claimed that the Corps acted arbitrarily and capriciously in refusing to suspend, modify, or revoke the permit in the public interest, under 33 CFR § 325.7. That claim is the one which the court of appeals (erroneously in petitioners' view) held not subject to judicial review under the Administrative Procedure Act.

> why potential environmental effects are insignificant," the Corps' decision not to prepare an EIS must be found to be unreasonable. . .. These arguments are easily rejected. . . .
>
> . . . [T]he question before us is not, as the Coalition urges, whether the MFR contains the requisite convincing reasons to stand on its own, but whether, under the appropriate standard of review, the determinative finding in the MFR is sustainable on the administrative record made. *Camp v. Pitts*, . . .

Pet. App. 9a. If that explicit statement were insufficient, examination of the opinion below (Pet. App. 1a-17a) would confirm that ruling. At no point in those 17 pages did the court purport to point out any document which constituted a reasoned evaluation of any environmental factors, or acknowledge that any such evaluation was required. Instead, the court stated:

> [T]he court's only role is to insure that the agency has **considered** the environmental consequences . .. The sheer volume of the administrative record in this case is evidence that the Corps gave environmental effects the type of **consideration** required . . . The Corps **considered** . . . In all, the Corps **reviewed** . . . [T]he question is whether the Corps **"considered"** environmental effects . . . The record is replete with evidence that each of these issues was before the Corps. . . .

Pet. App. 13a-14a (emphasis added). Respondents demean the court of appeals in arguing (p. 9):

> We do not read the court's opinion as expressing that view [that the Corps need not furnish a reasoned explanation for its FONSI]. Rather, it appears that the court of appeals understood petitioners' claim to be that the Corps failed to consider relevant environmental factors.

The Summary of Argument at page 13 of petitioners' brief in the court of appeals reads as follows:

> 1. The proposal to build a stadium in the floodplain, premised upon the commitment of the Football Cardinals to sign a long-term lease, became moot when the Cardinals flew to Phoenix.
>
> 2. The role of the court is to determine whether the MFR supplies a convincing statement of reasons why the potential effects of the revised project are insignificant, **not to determine whether the Corps "considered" information**.
>
> 3. Judicial review is based on the whole record, including whatever detracts from the Corps' decision, not merely those portions which the Corps chooses to produce.
>
> 4. The MFR reveals that the Corps, rejecting the demands of FWS, EPA, MDNR and MDOC for an EIS, failed to acknowledge or assess a number of potentially significant environmental impacts.
>
> 5. The Corps may not escape the NEPA and other requirements of public notice and public involvement by issuing a notice and a permit for an industrial park, and thereafter, without public notice, permitting a non-industrial use which will have major environmental impacts.

(Emphasis added.) No judge of the Eighth Circuit could have "understood petitioners' claim to be that the Corps failed to consider relevant environmental factors."

It is ironic that the Corps now argues (pp. 10, 8-9) that the Corps "adequately explained the rationale for its decision" in the MFR, supplemented by the EA.[3] In the court of

[3] Respondents complain (p. 10) that "Petitioners have not explained why any further explanation was required . . ." On this petition for certiorari, the point is that the court of appeals has required no explanation at all. However, petitioners have illustrated some of the matters which need explaining at page 21 of the Petition.

appeals the Corps argued just the opposite: "The MFR is not, and is not intended to be, an environmental document. . . . The MFR is not the record that a court reviews to determine compliance by a federal agency. . ." (underlining in original). Brief for the federal appellees, pp. 20, 22. The Corps' reversal of its position comes too late to eradicate the Eighth Circuit's erroneous ruling. The court of appeals has already upheld the Corps' earlier argument that a reasoned explanation is not necessary.

At page 9, note 5, respondents argue that the earlier Eighth Circuit decisions do not really hold that an agency need not explain its decision not to prepare an EIS. These are the arguments presented by petitioners in the court below, and rejected by that court.

Stripped of its camouflage, the brief in opposition (p. 11) constitutes a simple confession of error on the first of the Questions Presented. But this confession of error will not be available to the Eighth Circuit, or the Eighth Circuit bar, in the future. It will not bring the Eighth Circuit into line with the other circuits. If experience in this case is any guide, it will not even restrain Department of Justice attorneys writing briefs in the Eighth Circuit in the future. The minimal relief to be granted is to vacate and remand the decision below, for reconsideration in the light of *Marsh v. Oregon Natural Resources Council*, 109 S.Ct. 1851 (May 1, 1989). *E.g., Egan v. City of Aurora*, 365 U.S. 514, 515 (1961); *Walton v. Arkansas*, 371 U.S. 28, 29 (1962). However, the deficiencies of the MFR being as plain as they are (see Petition, p. 21), judicial economy would be better served by outright reversal. Rule 23.1.

2. To vacate and remand, or to reverse outright, on the first Question Presented would not clarify the muddle created by the Eighth Circuit, unless this Court also grants certiorari on the second Question Presented. The Eighth Circuit adheres to its peculiar NEPA rule that the reviewing court will refuse to review a determination of no significant impact unless the plaintiff demonstrates facts "omitted

from the administrative record" which would show that the project could have a substantial impact on the environment. The court of appeals has ruled that these petitioners failed to demonstrate such facts, and are therefore barred. See Petition, pages 18-22. Respondents do not contend that they can present "any matter or ground why the [second Question] should not be reviewed by this Court." Rule 22. Respondents do not deny that the Eighth Circuit made this ruling, that this ruling is the authoritative affirmation of a consistent line of Eighth Circuit decisions, that the Eighth Circuit rule is rationally indefensible, or that the rule is a rule of fundamental importance, drastically curtailing judicial review of NEPA cases in the Eighth Circuit. The Solicitor General simply ignores this Question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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